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No. 75-777

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (App. A, *infra*, pp. 1a-136a) is reported at 521 F.2d 885. The decision and order of the National Labor Relations Board (App. C, *infra*, pp. 139a-171a) is reported at 204 NLRB 760.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 137a-138a) was entered on July 1, 1975. On September 18, 1975, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including November 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a union engages in an unlawful secondary boycott within the meaning of Section 8(b)(4)(B) of the National Labor Relations Act when it induces its members, employees of a firm with which the union has a collective bargaining agreement containing a "work preservation" clause, to refuse to handle prefabricated goods that their employer's contract with a general contractor obliges the employer to install.

STATUTES INVOLVED

Section 8(b) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(b), provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> * * * *
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> * * * * *

STATEMENT

A. The Board's Findings of Fact

The Austin Company, Inc. (Austin), was the engineer that prepared the specifications for construction of the Norwegian Christian Home for the Aged in Brooklyn, New York (the Home) (App. C, *infra*, pp. 139a-140a). The specifications called for the use of climate control units manufactured by Slant/Fin Corporation. Slant/Fin was to cut, thread, and install at the factory the internal piping on these units, which carried a one-year warranty contingent on factory fabrication of the internal piping. Austin, acting as the general contractor for the project, awarded a subcontract for plumbing work to Hudik-Ross Company, Inc. (Hudik). This subcontract, which was awarded by competitive bidding, called for Hudik to perform the heating, ventilating and air conditioning work for the home—including installation of the prefabricated Slant/Fin units (*id.* at 140a).

Hudik had a collective bargaining agreement with Local 638 of the Plumbers (the Union). Rule IX of this agreement provided that Hudik's steamfitter employees would cut and thread certain piping by hand on the jobsite. Shortly after the Slant/Fin units, which had been purchased by Austin, arrived on the jobsite, the Union's business agent told Austin's project superintendent that the Union's members would not install the units "because the piping inside the units was steamfitters' work" (*id.* at 150a) and that Rule IX of their contract with Hudik called

for them to do the inside piping work on site. The business agent told Hudik the same thing, and Hudik's employees did not install the units. Austin filed unfair labor practice charges with the Board.

B. The Board's Conclusions and Order

The Board concluded that the Union's refusal to install the Slant/Fin units was a secondary boycott, in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(b)(4)(B) (the Act). The Board stated (App. C, *infra*, pp. 141a-142a, 171a):

> We note that refusal of the [Union] to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, the subcontractor, and was for the purpose of preserving work they had traditionally performed. However, Hudik was incapable of assigning its employees this work; such work was never Hudik's to assign in the first place. Moreover, we note that the [Union] informed Austin, who did not employ employees represented by the [Union] and had no agreement with that Union, that it would not let Hudik install the climate control units involved. Considered together these facts clearly indicate that the [Union] was exerting prohibited pressure on Hudik with an object of either forcing a change in Austin's manner of doing business or forcing Hudik to terminate its subcontract with Austin. Since the pressure exerted by the [Union] on Hudik was undertaken for its effect on other employers,

this pressure was secondary and prohibited by Section 8(b)(4)(B). [Footnote omitted.]

The Board ordered the Union to cease engaging in such unlawful conduct (*id.* at 165a-167a).

C. The Court of Appeals' Decision

The court of appeals, sitting *en banc* and dividing five to four, remanded the case to the Board (App. A, *infra*). The court, reaffirming two prior panel decisions,[1] held that the Board's reliance upon Hudik's lack of power to assign the disputed work to its employees as the decisive factor was contrary to the principles enunciated in *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612.

The court observed that *National Woodwork* had held that the determination whether a work preservation clause and its enforcement violate Section 8(b)(4)(B) requires (App. A, *infra*, p. 14a)—

> an "inquiry into whether, under *all the surrounding circumstances*, the Union's objective was preservation of work for [the struck employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. * * * *The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting [struck] employer vis-a-vis his own employees.*"

[1] *Local 742, Carpenters* v. *National Labor Relations Board*, 444 F.2d 895, certiorari denied *sub nom. J. L. Simmons Co.* v. *Local 742, Carpenters*, 404 U.S. 986; *Local 636, Plumbers* v. *National Labor Relations Board*, 430 F.2d 906.

> [Emphasis, quote and brackets added by court of appeals; quoting from 386 U.S. at 644-645.]

This passage from *National Woodwork* persuaded the court of appeals' majority that the Union's activity here was primary. Since Hudik had executed a contract with the Union requiring it to preserve internal piping work for its employees, the court of appeals held that it could not "be considered a neutral bystander" when its employees struck to force it to honor that commitment (*id.* at 40a).[2]

The dissenting judges concluded that the Board had considered all of the circumstances, and that those circumstances fully supported the Board's conclusion that the Union was pursuing an illegal secondary objective. They argued (*id.* at 113a-115a; footnotes omitted):

> The majority rejects as inherently sophistical the notion that * * * employers [such as Hudik] can ever be termed neutral: in their eyes Hudik

[2] The court remanded the case to the Board, holding that the Board would be free to reconsider (1) whether the work preservation clause in Hudik's contract, viewed in the light of the custom and tradition of the industry, was intended to cover the work here at issue (App. A, *infra*, pp. 20a-24a, n. 25); (2) whether Hudik "knowingly entered" into the subcontract "in contravention" of its preexisting bargaining agreement (*id.* at 22a); and (3) whether the Union was in fact trying to organize Slant/Fin's employees (*id.* at 44a, n. 46). The court added that the Board also could consider Hudik's lack of control over assignment of the work as one factor in determining the Union's objective, but not "to the total exclusion of the circumstances which the *National Woodwork* Court stated might be relevant to the inquiry into the union's objective" (*id.* at 44a).

* * * has actively violated an understanding for which the Union bargained collectively, and the Union's dispute is clearly with Hudik. But the Labor Board takes a more refined and realistic view of the situation. The Board insists that the Union's true complaint is with the predilection of architects, engineers and general contractors for factory-designed and -assembled goods. The Board * * * simply recognizes as one factor influencing its decision that the policy of using prefabricated goods, and the power to compel their use, belong to the general contractor and not to the subcontractor. Thus the Union's dispute cannot logically be solely with the subcontractor, but must instead be also with the party who dictates that prefabricated products shall be employed: the owner, the designer, the general contractor.[3]

REASONS FOR GRANTING THE WRIT

1. This case presents a question expressly reserved in *National Woodwork*, *supra*, 386 U.S. at 616-617,

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[3] The dissenters added (*id.* at 85a; emphasis in original, footnote omitted):

> The Union is seeking what it asserts is *work preservation*, but the means it has chosen toward that end—a strike against an employer who never had the disputed work to assign—constitutes secondary pressure. * * * The only parties who could be said to have taken the work away from the local union are Slant/Fin, who manufactured the units complete with internal piping, and Austin, who specified the installation of such completed units. The strike insofar as it is against Hudik is not to achieve work *preservation* because the strike could not *preserve* work that Hudik never possessed and never had power to assign.

n. 3—whether a union engages in secondary activity proscribed by Section 8(b)(4)(B) of the Act when it strikes in an attempt to acquire for its members work that their employer did not receive from the general contractor and that their employer has no right to control. The question is a substantial and recurring one in the administration of the Act, potentially affecting, *inter alia*, all construction projects in the country.[4] Moreover, as the court of appeals acknowledged (App. A, *infra*, pp. 3a, 16a), its decision, while supported by cases in three other circuits,[5] conflicts with the decision of the Fourth Cir-

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[4] The "right-to-control" test was first articulated by the Board in 1958. *Deangulo and Local Union No. 98 (York Corp.)*, 121 NLRB 676, 685-686. Prior to this Court's decision in *National Woodwork*, the test had been approved by every circuit that had considered it. See *Local 636, United Association* v. *National Labor Relations Board*, 278 F.2d 858, 864 (C.A.D.C.); *Local 5, United Association* v. *National Labor Relations Board*, 321 F.2d 366, 369 (C.A.D.C.), certiorari denied, 375 U.S. 921; *National Labor Relations Board* v. *Enterprise Association, Local 638, United Association*, 285 F.2d 642, 645 (C.A. 2); *National Labor Relations Board* v. *I.L.A., Local 1694*, 331 F.2d 712, 716-717 (C.A. 3); *Ohio Valley Carpenters District Council* v. *National Labor Relations Board*, 339 F.2d 142, 145 (C.A. 6); *National Woodwork Mfrs. Ass'n.* v. *National Labor Relations Board*, 354 F.2d 594, 597 (C.A. 7), reversed in part on other grounds, 386 U.S. 612. See also *American Boiler Mfrs. Ass'n* v. *National Labor Relations Board*, 366 F.2d 815, 822 (C.A. 8).

[5] See *National Labor Relations Board* v. *Local 164, Int'l Bro. of Electrical Workers*, 388 F.2d 105, 109 (C.A. 3); *American Boiler Mfrs. Ass'n* v. *National Labor Relations Board*, 404 F.2d 556, 561 (C.A. 8); *Beacon Castle Square Bldg. Corp.* v. *National Labor Relations Board*, 406 F.2d 188, 192, n. 10 (C.A. 1) (dictum). The Ninth Circuit has vacil-

cuit in *George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F.2d 323 (C.A. 4), enforcing 201 NLRB 59.[6] The Court should resolve the conflict among the circuits on this important, recurring question in the administration of the National Labor Relations Act.

2. The Board's "right to control" test is designed to implement the Act's prohibition of secondary pressures, and it is fully consistent with the principles enunciated in *National Woodwork*.

The issue in *National Woodwork* was whether the union had engaged in an unlawful secondary boycott by refusing to permit its members, employed by Frouge, a general contractor, to install prefabricated doors. The collective bargaining agreement between Frouge and the union provided that union members would not handle doors that had been finished off the jobsite. The employees struck when Frouge nevertheless ordered such doors, although Frouge was

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lated on the question. Compare *Western Monolithics Concrete Products, Inc.* v. *National Labor Relations Board*, 446 F.2d 522, 526, with *Associated General Contractors of California, Inc.* v. *National Labor Relations Board*, 514 F.2d 433, 437-438.

[6] *Koch* sustained the Board's holding that the union's refusal to permit the employees of Phillips, with whom the union had an agreement providing for the fabrication of pipe on the jobsite, to handle prefabricated pipe was unlawful secondary activity because Phillips' contract with Koch called for Phillips to install prefabricated pipe, and Phillips therefore "did not have control of the pipe fabrication" (490 F.2d at 327). The Board relied on *Koch* in reaching its decision here. See App. C, *infra*, p. 142a.

not required to do so by its contract with the project owner. The Court stated that the determination whether the "will not handle" clause of the collective bargaining agreement, and its enforcement, were unlawful "cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would * * * become secondary" (386 U.S. at 644-645, footnote omitted). Applying this test, the Court held that the objective of the "will not handle" clause "was preservation of work traditionally performed by the job-site carpenters," making the clause itself a lawful work preservation agreement, and that the facts established that the union's object in invoking that clause against Frouge was "*solely* [the] preservation of the traditional tasks of the jobsite carpenters" (*id.* at 646; emphasis added).

In *National Woodwork*, the union exerted pressure against the decision of Frouge to use precut doors; the decision was Frouge's to make. Here, by contrast, Hudik had no such discretion. Although the Union represented Hudik's employees, it was Austin's decision that the Union found objectionable. In *National Woodwork*, the union could accomplish its design by changing the decision of Frouge alone. In the present case the Union's efforts cannot suc-

ceed unless they change Austin's decision as well as Hudik's. That is the critical difference. In both *National Woodwork* and this case the union's efforts, if successful, would have an effect upon third parties. The secondary effect was "incidental" (and therefore lawful) in *National Woodwork*, while the secondary effect is an "object" of the union's actions (and therefore unlawful, in the Board's view) in this case.

Hudik had available only two courses of action: it either could have induced Austin to change its requirements and specifications for the job, or failing that, could have terminated its subcontract with Austin.[7] The second course (like a refusal to bid on the job initially) would not have preserved or produced work for Hudik's employees; it would instead have deprived the employees of the other piping work on that job. The first course could result in work for Hudik's employees only if Austin could be induced to buy units that did not have prefabricated internal piping. Thus, as the dissenting opinion in the

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[7] The court of appeals speculated that Hudik could have attempted to settle the dispute by offering to compensate its employees for the lost work (App. A, *infra*, pp. 29a-31a). However, the Union never indicated that it would have been content if Hudik had paid its employees for the piping work on the Slant/Fin units. The Union's agent stated to both Austin and Hudik that the Union members simply would not install the Slant/Fin units (App. C, *infra*, pp. 141a, 150a). There is thus no occasion to consider whether there would have been a violation of Section 8(b)(4)(B) had the Union merely demanded compensation from Hudik.

court of appeals observed (App. A, *infra*, p. 83a), "the pressure created by the Hudik employees' boycott of the Slant/Fin units must have been directed at Austin and Slant/Fin as they were the only parties with the power to satisfy the demand that the work be taken from Slant/Fin employees and reassigned to the Union." Indeed, the fact that the Union agent went to Austin first (App. C, *infra*, pp. 141a, 150a) confirms that the Union's principal concern was Austin's decision to purchase prefabricated units.

The fact that the Union may also have had a legitimate desire to preserve work for its members does not require a different conclusion. The Union's action was unlawful if *an object* of the action falls within the statutory proscription. *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. 675, 689. See also *National Labor Relations Board* v. *Local 825, Operating Engineers*, 400 U.S. 297, 305. Although primary activity lawfully may have the incidental effect of forcing a cessation of, or change in, business relations, the Board could reasonably conclude, as it did, that such a cessation or change, although "incidental" in *National Woodwork*, was an "object" of the Union here. While a decision by Frouge not to buy prefabricated doors would have secured more work for its employees, a cessation of business relations between Hudik and Austin would have produced no work on the Home for Hudik's employees; they could have obtained the work they sought only if Hudik had succeeded in inducing Austin to alter Austin's specifications

and its business relations with Slant/Fin. It was proper, therefore, for the Board to conclude that the Union's pressure on Hudik was not "related solely to preservation of the traditional tasks of the job-site [steamfitters]," but was "tactically calculated to satisfy union objectives elsewhere." *National Woodwork*, *supra*, 386 U.S. at 644, 646.

Neither the fact that Hudik's agreement with the Union commits it to award internal piping work to its steamfitter employees nor the fact that it arguably violated that agreement by agreeing with Austin to install the Slant/Fin units indicates that the Union's pressure on Hudik is solely primary. Whether the Union's pressure on Hudik is primary or secondary depends on the criteria for differentiating the two types of activity, criteria that Congress has incorporated in the Act; the parties cannot by contract convert into primary activity that which the statute makes secondary. See *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 105. If, as we have argued, the Union's pressure is secondary because directed against an employer that is able to "preserve" work for the Union's members only by inducing a third party (Austin) to cease doing business with still a fourth party (Slant/Fin), the pressure does not become legitimate primary activity merely because the employer may promise, in an agreement with the union, to cooperate.[8]

[8] Whether the agreement to cooperate would itself be lawful when applied to a situation where the contracting employer lacks control over the work sought is a question of some difficulty that need not be pursued here. Cf. *Connell Construction Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 628-629.

3. In 1970, after the District of Columbia Circuit had decided in *Local 636, Plumbers, supra*, that the Board's "right-to-control" doctrine is inconsistent with *National Woodwork*, the Solicitor General declined the Board's request that certiorari be sought. When *Local 742, Carpenters, supra*, was decided adversely to the Board, the employer sought certiorari, and the Board requested the Solicitor General to acquiesce in the employer's petition. The Solicitor General declined to do so, although the memorandum filed in that case (No. 71-357, October Term, 1971) presented to the Court the Board's view that certiorari should be granted. Certiorari was denied, with Mr. Justice Brennan and Mr. Justice White noting that they voted to grant certiorari (404 U.S. 986).

During the four years since certiorari was denied in *Local 742, Carpenters*, the Board has adhered to the same position on this issue and the Fourth Circuit has accepted the Board's position (see p. 10, n. 6, *supra*), creating a conflict among the circuits with respect to this important issue of labor law. The Commission on Revision of the Federal Court Appellate System has singled out the "right-to-control" doctrine of the Board as an important issue that has for too long escaped authoritative resolution.[9]

[9] Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* 59, A147-A148 (1975).

Although the Solicitor General's memorandum in *Local 742, Carpenters*, expressed doubt that the Court would rule favorably to the Board if the issue were to receive plenary consideration, the Solicitor General has reexamined that position in light of subsequent decisions and has concluded that the arguments set out at pages 10-14, *supra*, persuasively distinguish this case from the situation involved in *National Woodwork*. Accordingly, the Solicitor General now joins with the Board in urging that certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1764

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition to Review and Cross-Application to Enforce an Order of the National Labor Relations Board

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Argued June 13, 1974

Decided July 1, 1975

WRIGHT, *Circuit Judge*: We are required by this case to review once again the National Labor Relations Board's "right to control" test for determining whether a union has engaged in secondary activity

proscribed by Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(b) (1970).[1] The Board found that the petitioner union, Enterprise Association, had violated Section 8(b)(4)(B) by directing member steamfitters to refuse to comply with their employer's instruction to install prefabricated climate control units. Although the Board specifically determined that the refusal "was for the purpose of preserving work [the steamfitters]

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[1] Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970), provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> * * * *
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of

had traditionally performed,"[2] the Board nevertheless held it to be secondary activity because the steamfitters' employer did not have the legal right to control assignment of the work which the union was attempting to preserve.

We have held in two previous decisions, *Local 742, Carpenters* v. *NLRB*, 144 U.S.App.D.C. 20, 444 F.2d 895, *cert. denied*, 404 U.S. 986 (1971), and *Local 636, Plumbers & Pipefitters* v. *NLRB*, 139 U.S.App. D.C. 165, 430 F.2d 906 (1970), that the right to control test misconstrues Section 8(b)(4)(B) as interpreted by the Supreme Court in *National Woodwork Manufacturers Assn* v. *NLRB*, 386 U.S. 612 (1967). Despite the fact that at least four of our sister circuits have similarly rejected the Board's position,[3] the Board has nevertheless steadfastly per-

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> section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

[2] Joint Appendix at 254.

[3] *See NLRB* v. *Local 164, IBEW*, 388 F.2d 105, 107-10 (3d Cir. 1968); *American Boiler Mfrs Assn* v. *NLRB*, 404 F.2d 556, 561 (8th Cir. 1968); *Beacon Castle Square Bldg Corp.* v. *NLRB*, 406 F.2d 188, 192 n.10 (1st Cir. 1969) (dictum); *Western Monolithics Concrete Products, Inc.* v. *NLRB*, 446 F.2d 522, 526 (9th Cir. 1971). The Second Circuit has also employed an analysis of § 8(b)(4)(B) which is inconsistent with the right to control doctrine. *NLRB* v. *Local No. 21, Sheet Metal Workers*, 380 F.2d 827, 830 (1967). *See also Danielson* v. *Painters Dist. Council No. 20*, 305 F. Supp. 1108, 1113-17 (S.D.N.Y. 1969) (dictum) (denying § 10(1) preliminary injunction). Law review commentators have also been critical of the right to control test. *See, e.g.*,

sisted in applying its test. The Board's recent attempt to provide an acceptable rationale for its approach and to explain how the disputed test is consistent with the analysis of *National Woodwork*, *supra*, has now been approved by the Fourth Circuit in *George Koch Sons, Inc.* v. *NLRB*, 490 F.2d 323

Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1036-39 (1965); Note, 77 YALE L. J. 1401, 1416 (1968) ("The modern primary-secondary analysis requires the complete abandonment of the present 'right to control' rule.").

Recently a panel of Ninth Circuit judges approved the Board's right to control test in dictum. *See Associated General Contractors of California, Inc.* v. *NLRB*, —— F.2d —— (No. 73-3354, decided March 28, 1975), *vacating* 207 NLRB No. 58 (1973). Although professing that a subcontractor's right to control is merely an "important factor" in assessing "all the surrounding circumstances" of a labor dispute, the *Associated General Contractors* court in effect asserted that a single, sufficient criterion for finding that a subcontractor is a "neutral, unoffending employer" is the fact that it "did not have and never had the power to accede to the union's demands." *Id.*, —— F.2d at ——, slip op. at 5. *See also, e.g., id.* at ——, slip op. at 6 ("A union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign. When it is applied to work beyond the employer's power to give, a work preservation clause necessarily embodies a prohibited secondary objective."). This is, in actuality, the *per se* right to control test. *See* note 9 *infra*. It is curious that in making these statements the Ninth Circuit panel acknowledged neither a contrary precedent in the Ninth Circuit, *see Western Monolithics, supra*, nor the analysis and holdings (or the existence) of contrary cases in four other circuits. Moreover, in basing its holding on the rationale that in such situations the union is seeking to acquire rather than to preserve work, the court manifested a misunderstanding of the nature of work preservation agreements. *See, e.g.*, pp. 26-29 & notes 25, 34, & 37 *infra*.

(1973). We have reconsidered the right to control test in light of the Board's rationalization in *Koch*,[4] but we continue to adhere to our previous holdings that the test impermissibly expands the congressionally intended scope of Section 8(b)(4)(B).

I

Petitioner Enterprise Association, a plumbing and pipefitting union, has for many years negotiated a collective bargaining agreement with Hudik-Ross Company, a firm engaged in the business of heating, ventilating, and air conditioning contracting. The agreement which was effective during the period of the union's allegedly secondary activity contained a provision, Rule IX, which obligated Hudik-Ross to have its employees "cut and thread internal piping in climate control units" which Hudik-Ross contracted to install.[5] This cutting and threading was work traditionally performed by employees in the bargaining unit.

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[4] *See Local 438, Plumbers & Pipe Fitters*, 201 NLRB 59, *enforced sub nom. George Koch Sons, Inc.* v. *NLRB*, 490 F.2d 323 (4th Cir. 1973). Unlike its earlier right to control opinions, in its *Koch* opinion the Board does say it is applying the "all the surrounding circumstances" test required by *National Woodwork* and all the Circuit Courts that have considered the question. But a mere reading of the Board's opinion demonstrates that its application of the *National Woodwork* test is *pro forma* and that its own right to control test is determinative. *See also* note 9 *infra*.

[5] JA at 253.

The Austin Company is the general contractor and engineer for construction of the Norwegian Home for the Aged in Brooklyn, New York. In January 1972, as a result of competitive bidding, Hudik-Ross was awarded a subcontract to provide the heating, ventilation, and air conditioning work for the Norwegian Home construction. This subcontract incorporated Austin's specifications that certain heating and air conditioning units manufactured by Slant/Fin Corporation would be installed in the Norwegian Home. The specifications clearly indicated that the internal piping for these units was to be cut, threaded, and installed at the Slant/Fin factory, and the Board accepted the trial examiner's finding that "Hudik was aware of the specifications prior to making its bid and at the time it executed the subcontract" with Austin.[6] It is not disputed that this cutting, threading, and installation was the type of work which, under Rule IX of its collective bargaining agreement with the union, Hudik-Ross was obligated to have performed on the jobsite by its employees. However, there is no indication in the record, and the Board made no finding, that Hudik-Ross ever attempted to extricate itself from the pinch of two inconsistent contractual commitments by initiating bargaining with the union concerning a possible relaxation of Rule IX.

Shortly after the Slant/Fin units arrived at the Norwegian Home jobsite, a business agent for the

[6] *Id.* at 234.

union informed Hudik-Ross that the steamfitters represented by the union would not install the units because their internal piping had been completed at the factory in violation of Rule IX. The refusal to install the Slant/Fin units having delayed completion of the Norwegian Home, Austin filed a complaint with the Board charging that the union was violating Section 8(b)(4)(B) by encouraging individuals employed by Hudik-Ross to refuse to perform certain services with an object of forcing or requiring Austin and Hudik-Ross to cease using the products of Slant/Fin. Both the administrative law judge (ALJ) and the Board sustained Austin's charge, despite the fact that there was no evidence indicating that the union or its affiliates had ever attempted to organize Slant/Fin or that the union was even aware of the organizational status or working conditions of the Slant/Fin employees.[7] Indeed, the Board concluded that the union's refusal to let Hudik-Ross employees install the units "was for the purpose of preserving work they had traditionally performed," [8] However, applying its right to control doctrine,[9] the Board found

[7] *See id.* at 236.

[8] *Id.* at 254.

[9] Since the right to control doctrine had been rejected by five circuits, the Board understandably did not mention that doctrine by name. Rather, after noting the union's work preservation purpose, the Board merely cited its *Koch* opinion and stated that "Hudik was incapable of assigning its employees this work; such work was never Hudik's to assign in the first place." *Id.* See also note 36 *infra.* In its brief to this court the Board admits that it is applying the right to

that the union's actions constituted impermissible secondary pressure against Hudik-Ross because Hu-

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control doctrine, but characterizes the test as merely creating a "*prima facie*" inference that there is an illegal secondary objective, "absent proof to the contrary." Brief for the NLRB at 5. We realize that under *SEC* v. *Chenery Corp.*, 318 U.S. 80, 93-95 (1943), we review the Board's opinions and not its counsel's brief. However, since counsel's rationalization might be adopted by the Board in its next right to control case, we deem it useful, in the interest of bringing right to control litigation to an early conclusion, to comment on it. In short, we find that, given the virtual impossibility of proving the *lack* of the imputed secondary objective, this "*prima facie*" approach in effect constitutes the same old *per se* test which we have condemned in our prior opinions and which contravenes the rationale and spirit of *National Woodwork*. *See* pp. 10-32 *infra*.

Our conclusion that Hudik-Ross is far from being an innocent neutral bystander to the dispute over installation of the prefabricated units does not depend at all on any suspicion that Hudik-Ross instigated Austin's decision to use the Slant/Fin units. *Cf. Painters Dist. Council No. 20*, 185 NLRB 930, 932 (1970). We fully accept the Board's factual finding that Hudik-Ross merely bid on a job for which Austin had already specified the Slant/Fin units. Rather, our conclusions are based on an analysis of *all the surrounding circumstances* of the conflict, *not just the circumstances relating to the locus of actual power to assign the work*. By contrast, once the Board finds that the employer lacked legal control, it finds a *per se* violation of § 8(b)(4)(B). *See generally Local 438, Plumbers & Pipe Fitters, supra* note 4. As we stated in *Local 742, Carpenters* v. *NLRB*, 144 U.S.App.D.C. 20, 24, 444 F.2d 895, 899 (1971):

> The artificiality of the [Board's right to control] test is particularly patent in cases such as this one—where the employees apparently have a grievance growing out of labor relations with their own employer (*i.e.*, loss of traditional unit work) and immediately provoked by an action of their own employer (*i.e.*, his signing of a con-

dik-Ross, not having the legal power to determine who would perform the internal piping for heating

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> tract which would deprive them of that work). The Board does not stop to consider these aspects of the dispute. Nor does it look to see whether there may be other grievances, against other employers, which underlie the union's action. Rather, the Board seems to hold that, when an employer contracts away his power to satisfy union demands, he also contracts away his interest and involvement in the labor relations issue in dispute. He is depicted as the mere passive agent of others * * * ; the fact that the present dispute has its origin and its substantive focus in his ongoing labor relations with his employees is deemed irrelevant. * * *

(Footnote omitted.)

In attempting to rationalize and affirm the Board's holding, the dissenters present a smorgasbord of possible explanations of what the Board has done. *But see* dissenting op. at n.72. First, we are offered the *per se* right to control test in its purest form:

> Hudik is essentially neutral in this dispute *because it does not have and never did have the power to comply with the Steamfitters' demands*. Thus the pressure created by the Hudik employees' boycott of the Slant/Fin units *must have been directed at Austin and Slant/Fin as they were the only parties with the power to satisfy* the demand that the work be taken from Slant/Fin employees and reassigned to the Union.

Id. at 15 (emphasis added). *See also id.* at 16 ("The Union is seeking what it asserts is *work preservation*, but the means it has chosen toward that end—a strike against an employer who never had the disputed work to assign—constitutes secondary pressure.") (emphasis in original); *id.* at 27 ("Even where right to control is not decisive, in almost any case it will be a factor entitled to very substantial weight because it measures the ability of the employer to comply with the union demands."); *id.* at 31 ("boycotts by craft unions against subcontractors *necessarily* have as a pri-

and cooling units in the Norwegian Home, was a neutral in that dispute.

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mary object the *application of pressure to those third parties who actually require the use* of factory-prepared products") (emphasis added); *id.* at n.53 ("[O]nly Austin and Slant/Fin are capable of acceding to the Union's demands. Thus Hudik is neutral with respect to the particular remedy of economic action which the Union invoked to redress its grievances."); *id.* at 52 & n.101. *But see id.* at n.44.

Next, we are told that the Board has applied a *prima facie* test because it will validate a work preservation action against a subcontractor who possessed the legal right to control the work assignment but contracted away that right:

> The Board does not employ a *per se* formulation, which might well violate the stricture of *National Woodwork* that the focus of a union's action must be determined from all the surrounding circumstances; instead, the Board relies on a *prima facie* standard. By this test, a union may not boycott an employer who lacks the right to control the assignment of disputed work, *provided* that the employer has not voluntarily relinquished that control. The redeeming feature of this criterion is that it permits and even mandates the conclusion that the union acted properly in launching an economic action whenever "the employer's loss of power to assign the work is the result of his own efforts to instigate the subcontracting to another of work subject to his work preservation agreement with the union" * * *. In such a case the employer would cease to be neutral, and would be termed "offending" by virtue of his voluntary action surrendering legal control of the disputed work.

Dissenting op. at 37-38 (footnotes omitted; emphasis in original). *See also id.* at 50 ("the *prima facie* right-to-control test rests on the Board's considered judgment that a subcontractor's *inability to affect or avoid prefabrication specifications* in general contracts renders him an inappropriate and impermissible target of union economic activtiy") (emphasis added). This is the approach of the Board as elaborated in

II

Our two earlier opinions rejecting the Board's right to control test were guided by the teaching of the Supreme Court in *National Woodwork, supra.*

Koch, and which, as we have indicated above, is a *per se* test once the *actual docus of legal control* is isolated; the Board does not consider other circumstances to determine whether the employer without control over the work itself is nevertheless not a neutral in the labor dispute.

Finally, the dissent asserts that the Board, in conformity with the *National Woodwork* decision, actually evaluated "all the surrounding circumstances" to determine whether Hudik-Ross was a neutral; the Board, under this rationalization, did not simply label Hudik-Ross a neutral party once the Board concluded it did not have, and never had, the legal power to assign its employees the disputed work. *See, e.g.*, dissenting op. at 8-10, 25-26, 32-34, 59, & nn.8, 74. The dissent premises this explanation on the fact that the ALJ, in another context, used the phrase "all the surrounding circumstances," and the fact that the Board affirmed his "rulings, findings, and conclusions" to the extent they were consistent with its decision. *See, e.g., id.* at 25-26 & n.8. Based on this slender reed, we are implored to discount the fact that the Board, in citing *Koch* as the basis for its decision, was following its right to control test as fully enunciated in that case. The dissent wisely omits the Board's citation of *Koch* and similar cases in its otherwise extensive quotation from the Board's decision, *see id.* at n.10, and it is clear that both the ALJ and the Board simply categorized Hudik-Ross as a neutral *because* it lacked control over the assignment of the disputed work. Indeed, the ALJ concluded:

> While it is true that there are conflicting interpretations of the *National Woodwork* decision, *supra,* I believe that under the Board's view of the law the Respondent herein has violated section 8(b)(4)(ii)(B) of the Act *since Hudik was a secondary employer that,* unlike Frouge

> in the *National Woodwork* case, *had no control over the selection and specification of the prepiped units.* * * *

JA at 242 (emphasis added). Moreover, the cases cited and discussed by the ALJ, *see* JA at 237, 242 n.13, are all ones in which the Board determined that the locus of control over the work in dispute was conclusive as to the question of the legality of the union's activity.

Nevertheless, it is true that the ALJ employed the phrase "surrounding circumstances" in the hypotheticals quoted by the dissent, *see* dissenting op. at n.8, and the dissenters dwell at considerable length on the circumstances to which the ALJ referred—the extent to which the construction industry in major metropolitan areas is unionized. *See, e.g., id.* at 32-36. However, the ALJ simply referred to that factor as a circumstance which he believed made Hudik-Ross an *effective* instrumentality of pressure against Austin and Slant/Fin. *See id.* at n.8. Even the ALJ recognized that this factor (effectiveness or ineffectiveness of secondary pressure) is absolutely irrelevant to the question of whether Hudik-Ross was a *neutral* in the labor dispute and thus immune even from *threats* of secondary pressures under § 8(b)(4)(B). *See id.* ("the fact that in Example A * * * Hudik would be an ineffective means of pressure by the Union against Slant/Fin and Austin, and, in Example B, the instant case, Hudik is an effective means of pressure in view of all the surrounding circumstances, does not alter the fact that in both situations, Hudik is a means or instrumentality and that the Union's primary dispute is with Slant/Fin and Austin"). *But see* dissenting op. at n.55. Thus the ALJ's use of that phrase (as part of an argument that Hudik could not comply with the union's demands) in no way discredits our conviction that both the ALJ and the Board are continuing to apply an impermissible *per se* right to control test. Moreover, as we elucidate more fully later in our opinion, both the ALJ and the Board are incorrect in the premises which underlie both the right to control test and the hypotheticals the dissent quotes; Hudik is not a neutral in this labor dispute, *see generally* pp. 16-32 *infra*, and it may comply with the union's demands, even without ceasing doing business with Austin and Slant/Fin or attempting to force them to change their business practices, *see, e.g.*, pp. 24-32 *infra*.

Affirming the Board, the *National Woodwork* Court held that a work preservation clause in a collective bargaining agreement does not violate Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1970),[10] and that a carpentry union's refusal to install prefabricated doors pursuant to such a clause is primary activity that does not violate Section 8(b)(4)(B) when the union's sole objective is preservation of work which its member employees had traditionally performed. The Court traced the evolution of Sections 8(b)(4)(B) and 8(e) and determined that the sweeping language of these sections had to be qualified by the congressional intent, now expressed in the proviso to Section 8(b)(4)(B), to permit coercive union activity which had traditionally

[10] Except for those agreements specified in the proviso to § 8(e), that section renders void and unenforceable an employer's agreement to do that which § 8(b)(4)(B) prevents the union from exerting pressure to bring about. *See* note 38 *infra*.

The language of § 8(e) is comparable to the language of § 8(b)(4)(B) in most significant respects:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [*sic*] and void [.] * * *

been considered primary rather than secondary.[11] Recognizing that the critical distinction between secondary and primary activity would often be a subtle and difficult one to make, the Court concluded that the determination whether the carpentry union's refusal to install the premachined doors was protected primary activity would turn on an "inquiry into whether, under *all the surrounding circumstances*, the Union's objective was preservation of work for [the struck employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. * * * *The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting [struck] employer vis-a-vis his own employees.*" [12]

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[11] In 1959, a proviso was added to § 8(b)(4)(B), explicitly exempting primary activity from the prohibitions of that section:

> *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

The *National Woodwork* Court held that, in light of congressional intent, the same limitation was implicitly incorporated into § 8(e). *See* note 38 *infra*.

[12] 386 U.S. at 644-45 (emphasis added; footnotes omitted). In a companion case, *Houston Insulation Contractors Assn* v. *NLRB*, 386 U.S. 664, 668 (1967), this language was reaffirmed. "*National Woodwork Mfrs., supra*, holds that collective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity."

The Supreme Court found that the Board had appropriately applied this test for distinguishing primary from secondary activity since the Board had ascertained on the basis of substantial evidence that the carpentry union's refusal to install the prefabricated doors "related solely to the preservation of the traditional tasks of the jobsite carpenters." [13]

As we recognized in *Local 742, supra*, and *Local 636, supra*, the *National Woodwork* Court explicitly noted that it was not presented with the question of the propriety of the Board's right to control doctrine since the struck employer in that case was a general contractor who had the legal power to determine who performed the work the union desired to preserve.[14] We nevertheless held, as have all but one of

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[13] 386 U.S. at 646.

[14] *See id.* at 616-17 n.3. Much of the argumentation in the briefs to the Court in *National Woodwork* concerned the propriety of upholding the union's actions *because* the employer had control of the work. Indeed, the Board felt compelled to assert that

> even if the Court might conclude that the Board and the court below placed undue emphasis on the fact that Frouge had "control" over the kind of doors he could use * * * the result reached * * * is nevertheless proper.

Brief for the NLRB at 7. Rather than base its holding on the extent of employer control, the Supreme Court engaged in a detailed factual examination of "all the surrounding circumstances" of the dispute. Seen from this perspective, its "reservation" of the control question is better understood as a warning that the opinion not be read as impliedly *approving* the Board's right to control doctrine. In resolving the right to control problem, we now follow the lead of the Supreme Court in determining, on all the factors

our sister circuits that have faced the issue,[15] that the reasoning underlying the *National Woodwork* decision compels the conclusion that an employer's lack of legal control over the work the union seeks to preserve for its members cannot alone be decisive of the legality of the union's objectives.[16] Indeed, we remain convinced that, absent other evidence that a work preservation strike is actually intended to satisfy illegal secondary objectives, such a strike is lawful primary activity, protected under Sections 7 and 13 of the National Labor Relations Act, 29 U.S.C.

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presented, whether the union's goal is solely work preservation and whether the struck employer is a neutral to the dispute.

[15] *See* note 3 *supra*. Even the Fourth Circuit, in approving the Board's right to control test, was at pains to conclude that in finding a violation the Board had looked to "all the surrounding circumstances," as required by *National Woodwork*. *See Koch*, *supra* note 4, 490 F.2d at 327. However, the Board in that case found the subcontractor's lack of control determinative of the legality of the union's conduct, *see* 201 NLRB at 61; all of the "surrounding circumstances" supplied by the Fourth Circuit in its opinion were merely alternative ways of describing that fact. *See* 490 F.2d at 327.

[16] While the employer's lack of legal control cannot be determinative, it may still be considered by the Board as part of its inquiry into the union's actual objectives. *See Local 742, Carpenters* v. *NLRB*, *supra* note 9, 144 U.S.App.D.C. at 28, 444 F.2d at 903; *Local 636, Plumbers & Pipefitters* v. *NLRB*, 139 U.S.App.D.C. 165, 169-70, 430 F.2d 906, 910-11 (1970). *See also* pp. 37-40 *infra*.

§§ 157, 163 (1970),[17] as well as under the proviso to Section 8(b)(4)(B).

A.

In validating work preservation clauses, the *National Woodwork* Court placed primary reliance on the legislative history of Sections 8(b)(4)(B) and 8(e). The Court determined that Congress only intended these sections to prohibit coercive union activity that is directly exerted against an "unconcerned" [18] or "neutral" [19] employer, drawn by the union's activities into "disputes not his own." [20] Section 8(b)(4)(B) was seen as an accommodation between the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their

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[17] These sections preserve the right of employees to strike and to engage in other concerted activities for the purpose of mutual aid or protection. The *National Woodwork* Court stated that, in "the absence of clear indicia of congressional intent to the contrary, these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions." 386 U.S. at 643.

[18] *Id.* at 624.

[19] *Id.* at 623, 632.

[20] *Id.* at 620, 626.

own." [21] The Board acknowledges that the neutrality of the employer against whom pressure is directly exerted is critical to the distinction between primary and secondary activity.[22] It nevertheless comes to the remarkable conclusion that an employer like Hudik-Ross, which is struck by its own employees for the purpose of enforcement of a clause in its collective bargaining agreement with these employees which preserves work which the employees have traditionally performed, is the type of innocent neutral which the Supreme Court says Section 8(b)(4)(B) was fashioned to protect. We cannot agree with the Board's portrayal.

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[21] *Id.* at 626-27, *quoting NLRB* v. *Denver Bldg & Constr. Trades Council*, 341 U.S. 675, 692 (1951). The dissenting judges delve into the legislative history of §§ 8(b)(4)(B) and 8(e) to prove that Congress was particularly concerned with *installation* abuses and thereby to prove that the refusal to install the prepiped units was illegal secondary activity. *See, e.g.*, dissenting op. at 18-25. However, the *National Woodwork* Court has already thoroughly canvassed this legislative history, *see generally* 386 U.S. at 620-44, and has concluded that the refusal to install prefabricated products is proper if the pressure is exerted against an employer who is not a neutral in the dispute. Merely characterizing the controversy as one involving purported installation abuses (and generally in the context of union action initiated with the objective of expanding the union's representational jurisdiction, *see e.g.*, dissenting op. at 21-23) does not lead to the delphic conclusion that the pressure in this case is tainted secondary activity.

[22] *Local 438, Plumbers & Pipe Fitters*, 201 NLRB 59, 61 (1973); brief for the NLRB at 5. *See also, e.g., d*issenting op. at 18.

To assert that Hudik-Ross is a neutral bystander innocently caught up in the union's attempts to achieve its objectives by changing Austin's policy of purchasing prefabricated climate control units is to ignore the realities of this labor conflict and the process by which Hudik-Ross was confronted with conflicting contractual commitments. The Hudik-Ross management did not innocently awake one day to find itself in the midst of this dispute. The management had negotiated, presumably in good faith, a collective bargaining agreement which obligated Hudik-Ross to preserve for its employees the work of cutting and threading internal piping on the climate control units which these employees were to install. When the management subsequently executed a contract with Austin which it was fully aware would require its employees to install units on which these employees had not done the internal piping, it could hardly have expected the employees to acquiesce in the blatant violation of their contractual rights.[23] As we empha-

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[23] Indeed, the terms of the collective bargaining agreement itself provide internal indicia that Hudik-Ross is not a netural to this dispute. Article One of that agreement specifies that both parties are to abide by certain rules governing wages, hours, "and other conditions of employment." JA at 210. Rule IX is among those to which both sides agreed to be bound. JA at 213. Article Two of the agreement then stipulates that strikes or lockouts are to be prohibited, but only "so long as this agreement *and the rules hereto attached* are conformed to by both parties." JA at 210 (emphasis added). Hudik-Ross must therefore have realized that it had contractually acknowledged the union's right to strike in the situation presented to us. Indeed, it is curious that Hudik-

sized in *Local 742*, *supra*, "The legal effect of the Board's test is to allow an employer to bind his own hands and thereby immunize himself from union pressure occasioned by his employees' loss of work. In one act, the employer helps to create a labor conflict and simultaneously wash his hands of it." [24] Hudik-Ross could have totally avoided the labor dispute merely by honoring its bargaining agreement and not bidding on a contract which required it to breach the valid work preservation provision it had negotiated with the union.[25] Thus, to accept the

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Ross, the "neutral" that was supposedly injured by being dragged into a "labor dispute not its own," did not file the charge of an unfair labor practice; rather, it was filed by the general contractor, Austin. Perhaps Hudik-Ross perceived the injustice that would result if it attempted to have the Board directly rectify Hudik-Ross' breach of contract; perhaps it merely sought to avoid the exacerbation of labor relations that would result by adding this insult to the injury it had previously inflicted on the union. We appreciate the fact that a contractual provision cannot immunize either an employer or a union from an unfair labor practice charge. *See, e.g., Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1954). However, we see no justification for converting this dispute over enforcement of a valid contractual provision, in which the union lawfully strikes in accordance with an explicit bargaining clause, into an unfair labor practice proceeding before the Board.

[24] *Local 742, Carpenters* v. *NLRB, supra* note 9, 144 U.S. App.D.C. at 24, 444 F.2d at 899.

[25] We do not believe that this restriction unduly ties an employer's hands concerning managerial decisions. Hudik-Ross could have, and still can, negotiate collective bargaining agreements which exempt from the work preservation clause work over which it does not have legal control. Indeed, on

Board's characterization of Hudik-Ross as a neutral bystander under these circumstances would allow the "Cinderella-like transformation of an obviously in-

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remand the Board is free to reconsider whether the parties to the agreement actually intended the cutting, threading, and installation of the internal piping of the climate control units to fall within its scope in the situation here presented. The dissent implies that the ALJ has already made a finding that the parties to the bargaining agreement did not so intend, and that the Board implicitly upheld this finding. *See, e.g.*, dissenting op. at 30-31, 57, & nn.71 & 106. However, the dissent recognizes that the ALJ declined to rely on his "opinion" that Rule IX "necessarily implied that it referred to pipe within Hudik's control," *see* JA at 237. Dissenting op. at n.7. In any event, the ALJ's "opinion" appears to be premised on his views of the ultimate merits of the right to control doctrine rather than on any expertise in interpreting collective bargaining agreements, and would appear to be contradicted by the plain language of the agreement, which stipulates that "[r]adiator branches, convector branches and coil connectors *shall be cut and threaded by hand on the job* * * *." JA at 233 (emphasis added). The Board accepted the fact that the work stoppage was motivated by the desire to preserve traditional unit work, and we therefore do not believe it accepted any finding (to the extent one may have been made) that this work was not intended to be included within the ambit of Rule IX. *See also* text appended to dissenting op. Figure 1. In any event, custom and tradition in the industry must also be looked to in determining the intent of the parties with respect to what work is to be preserved, even in the absence of an explicit work preservation provision. *See Local 742, Carpenters* v. *NLRB, supra* note 9, 144 U.S.App.D.C. at 24, 444 F.2d at 899. Moreover, given the record now before us, when the Board on remand analyzes "not only the situatition the pressured employer finds himself in but also how he came to be in that situation," in order to determine whether he is an "unoffending party," *see Local 438, Plumbers & Pipe Fitters, supra* note 4, 201 NLRB at 64, it must

consider whether Hudik-Ross knowingly entered the second contract in contravention of the prior one.

It is important to recognize that Hudik-Ross' refusal to bid on the Austin contract, in compliance with its collective bargaining agreement, would indeed serve work preservation goals. This point is often misunderstood. For example, the ALJ in this case asked rhetorically: "[I]f Hudik, an employer of union steamfitters, does not bid on jobs and does not secure subcontracts, how does such a situation preserve or increase work for Hudik's union steamfitters[?]" JA at 240. Yet he had unknowingly answered that question himself earlier in his opinion: "If prepaid [*sic*] units cannot be installed * * * Austin and other engineers and general contractors will not specify their purchase and use in buildings." JA at 239. The union certainly expected the work preservation clause to be complied with. Like the ALJ, it knew such clauses would in fact subserve its legitimate end of ensuring that its members could continue to perform in the future the work they had traditionally performed in the past. Of course, it is also true that Hudik-Ross and similar employers could bid on a subcontract specifying prefabricated products and still satisfy a union's work preservation goals, but in this latter situation they would probably be subserved by negotiation of a monetary settlement that would partially compensate the employees for their lost work. *See* pp. 26-29 & note 34 *infra*. It should also be noted that the dissent, apparently oblivious to the fact that Hudik-Ross could take this latter tack, compounds its error by making the statement, which has no support in the record, that "Hudik could not decline to bid on projects with prefabrication specifications and continue to be a competitive subcontractor." Dissenting op. at 31. If this were actually the case, one might wonder why Hudik-Ross contractually bound itself to such an allegedly self-destructive course.

Although the Board rejected the ALJ's misconception that Rule IX was not designed for work preservation purposes in these circumstances, a similar fallacious belief may lie at the root of its right to control doctrine. In its brief to the Supreme Court in *National Woodwork*, in

supporting its claim that the union had not violated § 8(b)(4)(B), the Board stated:

> [T]his provision [in the bargaining agreement in *National Woodwork*] was a lawful work preservation clause, reflecting the Union's policy of preserving for jobsite carpenters work which they have performed for over 80 years. *Since Frouge had failed to abide by this lawful contract provision, the Union had a legitimate dispute with him*; and, since he was not required by any arrangement with the project owner to use pre-cut doors, Frouge was in a position to accede to the Union's demands without having contract relations severed or even directly affected. Accordingly, by refusing to handle precut doors for Frouge, the Union confined its acitvity to the employer with whom it had its basic dispute, and its activity was therefore primary.

Brief for the NLRB at 5-6 (emphasis added). If the Board is serious about its characterization of the union/Hudik-Ross provision as a valid work preservation clause, the logic of *National Woodwork* should mandate a conclusion that the union's activity in our case is lawful. In *both National Woodwork* and this case, there was a valid work preservation clause. In *both National Woodwork* and this case, the employer could comply with the union's demands *before* breaking the contract. And, contrary to the Board's assertion, in *both National Woodwork* and this case, *some* third party would inevitably be affected by compliance *after* the contract was broken. Admittedly, only a manufacturer was involved in *National Woodwork*, whereas this case involves both a manufacturer and a general contractor. But that cannot obscure the fact that for all relevant analytical purposes the situation of the two employers is identical. *See also* note 28 *infra*.

A final misconception concerning work preservation agreements between subcontractors and unions is that exhibited by the dissent, *see, e.g.*, dissenting op. at 16-17, 31, and by the recent panel opinion in the Ninth Circuit, *see Associated General Contractors of California, Inc.* v. *NLRB*, *supra* note 3, —— F.2d at ——, slip op. at 6-7. This misconception involves

volved party," [26] and would both render nugatory the commitment which Hudik-Ross made [27] and demean

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the belief that when a subcontractor's employees request that when a construction contract specifies prefabricated products the subcontractor either not bid on the contract or else compensate them for their lost work, they are not seeking to *preserve* traditional work but are attempting to *acquire* additional work. However, by the very nature of subcontract bidding, a subcontractor will always be acquiring work when he bids on a project; the characterization of union activity as having a work preservation objective must therefore depend on whether it is the *type* of unit work which the employees have traditionally performed, not whether they actually performed the particular work in question. And as indicated above, enforcement of a work preservation clause is designed to protect such traditional work whether the subcontract specifications themselves required that the traditional work be replaced by prefabrication or whether the specifications granted to the subcontractor discretion to displace the employees' traditional work. In both situations the union seeks to prevent elimination of employees' work through factory prefabrication or, at a minimum, to prevent their employer from lending active support to eliminate of that work.

[26] *Local 742, Carpenters* v. *NLRB, supra* note 9, 144 U.S. App.D.C. at 24, 444 F.2d at 899.

[27] As Judge Lasker observed in a similar situation:

> It would be unthinkable to apply the "right to control" test to facts such as those just outlined. To do so would be to encourage subcontractor employers to undermine their collective bargaining agreements by actively soliciting contracts whose very terms called for conduct violative of those trade agreements * * *. Manufacturers and general contractors, too, would be tempted to insert all manner of specification and standard[s] into their licenses and contracts with a total disregard of subcontractors' commitments to their respective unions.

Danielson v. *Painters Dist. Council* No. 20, supra note 3, 305 F. Supp. at 1115.

the collective bargaining process which is the cornerstone of labor relations in the United States.[28]

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[28] *Cf., e.g., International Union of Electrical Workers* v. *NLRB*, 138 U.S.App.D.C. 249, 255, 426 F.2d 1243, 1249, *cert. denied*, 400 U.S. 950 (1970).

In its brief for respondent NLRB at 26, which it filed in *National Woodwork*, the Board stated:

> [W]here, as here, the union is opposed to a product, not because of its price or its design, but because it deprives the employees whom the union represents of work which they have traditionally performed, there is a sufficiently direct connection between the product and employment security to bring the question respecting the use of that product within the area of mandatory bargaining under the Act.

However, in its *Koch* opinion the Board distinguished *National Woodwork* and *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), from a situation where the employer lacks power to assign the work sought to be preserved:

> The situation here is radically different since Phillips never initially had the disputed work and thus obviously could not have contracted away that which it never had and could not have been ordered to bargain over that which it never had.

201 NLRB at 63 n.22. We fail to comprehend the logic of this assertion. Certainly Phillips in that case and Hudik-Ross in our case were free to agree not to execute other contracts which would require them to force their employees to handle prefabricated goods. This is effectively what a work preservation clause requires in the present situation. Although we do not reach the substantial question whether employers could be forced to bargain over such clauses, we find that, having negotiated and agreed to such a clause, Hudik-Ross must abide by it; nothing in the Act or the Supreme Court's decision in *National Woodwork* requires that an employer be allowed to escape such a freely-undertaken obligation merely by unilaterally executing subsequent contracts.

The Board insists on closing its eyes to the circumstances surrounding the creation of this labor dispute, circumstances which belie the assertion that Hudik-Ross is a neutral caught between the contending forces really involved in the work preservation controversy.[29] Instead, it reasons that, since "[the

[29] The Board's holding has the potential for unnecessarily harsh or excessively disruptive results. Although the ALJ found that Austin and Slant/Fin were the primary employers for purposes of the work preservation dispute with the union, the Board declined to decide whether the union could therefore have exerted direct pressure against them. *See* JA at 254 n.1. It is thus possible that the Board is prepared to accept the position advanced by *amicus curiae* Chamber of Commerce of the United States that, unless the target of the strike has *both* the power to control the work assigned and a bargaining relationship with the union, the union's economic pressures are illegal secondary activity. In the present case there would thus be no primary employer; indeed, in most subcontracting situations the subcontractor's employees would be deprived of all econmic weapons and all legal mechanisms for preserving their traditional work against onrushing technological changes. We do not find it necessary to rule on whether the union could have exerted pressure directly against Austin or Slant/Fin. However, we do note that interpreting § 8(b)(4)(B) so that, in a situation where a union is motivated by a single lawful goal, it is nevertheless adjudged guilty of secondary activity without there being some employer against whom it could have exerted pressure gives the section a harshness which has not heretofore been suggested by its most aggressive proponents. Certainly nothing in § 8(b) compels such a result.

On the other hand, when a union's sole objective is work preservation, it would be anomalous to allow it to press its demands on a general contractor with whom it has no ongoing relationship. Rather than limit the scope of labor disputes consonant with the congressional intent expressed in

subcontractor] had no past, present, or future authority to award this work to the Respondents, their actions here must have been undertaken to produce their effect elsewhere," [30] and thus must violate Section 8(b)(4)(B).[31] From the premise that it is "reasonable to hold that the object of the union was not an impossible act but was the alternative possible," [32] the Boach reaches what it considers to be an ineluctable conclusion that "where the pressured employer cannot himself accede to the union's wishes, the pressure is secondary because it is undertaken for its effect elsewhere." [33] But rhetoric and ration-

§ 8(b)(4), such a result is likely to expand them since it would probably affect all subcontractors on a jobsite. The *National Woodwork* Court tacitly accepted work preservation as a legitimate subject of mandatory collective bargaining, within the "wages, hours, and other terms and conditions of employment" language of §§ 8(d) and 9(a) of the National Labor Relations Act. *See* 386 U.S. at 642-43; note 28 *supra*. Disputes over such subjects are best resolved within the bargaining unit encompassing the contending parties. *See also Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, —— U.S. ——, 43 U.S. L. WEEK 4657 (June 3, 1975).

Although our holding that the right to control test must be rejected is not based on the above considerations, we find that they shed light on Hudik-Ross' actual involvement with the subject matter of this labor dispute.

[30] *See Local 438, Plumbers & Pipe Fitters, supra* note 4, 201 NLRB at 62.

[31] *See National Woodwork*, 386 U.S. at 645.

[32] *Local 438, Plumbers & Pipe Fitters, supra* note 4, 201 NLRB at 62 n.14, *quoting Ohio Valley Carpenters Dist. Council* v. *NLRB*, 339 F.2d 142, 145 (6th Cir. 1964).

[33] 201 NLRB at 63. *See also George Koch Sons, Inc.* v. *NLRB, supra* note 4, 490 F.2d at 327. Indeed the whole

affirmative case that the Board makes for the right to control doctrine is found in a single simplistic paragraph of its *Koch* opinion:

> By the contract under which [the subcontractor] Phillips was to perform its work at the G.E. site or not perform any work at all, *Phillips was contractually required to utilize in its work certain prefabricated pipe* which had not been worked on by the employees the [union] Respondents represented. Thus, *although the Respondent's claim of work preservation was indeed valid*, Phillips by its contract with [the general contractor] *Koch had no power to give the Respondents the work they sought*, since such work was never Phillips' to award in the first place. And as Phillips had no past, present, or future authority to award this work to the *Respondents*, their *actions here must have been undertaken in order to produce their effects elsewhere. Therefore*, since the pressure directed at Phillips was undertaken for its effect elsewhere, *such activity was secondary* even though Phillips was the immediate employer here. As the Supreme Court itself said in *National Woodwork*, "In effect Congress in enacting § 8(b)(4)(A) of the Act (hence this holds for the present Section 8(b)(4)(B)) . . . barred as a secondary boycott union activity *directed against a neutral employer*, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere."

201 NLRB at 62 (emphasis added; footnotes omitted).

As our opinion elaborates, we remain bewildered as to how Hudik-Ross may be characterized as "neutral" when it executed its contract with Austin in violation of a concededly valid work preservation clause. Nor can we understand how the union's refusal to acquiesce in that violation must indicate that its objectives were "directed elsewhere," particularly since Hudik-Ross could itself satisfy the union's demands, whether by negotiating a compromise with the union or, as in *National Woodwork*, terminating its tainted contract with Austin.

alization are no substitute for substantial evidence. Even ignoring Hudik-Ross' actions in initially bidding on the subcontract, the fallacy of the Board's conclusion is readily apparent. For even if one focuses narrowly on the point in time when Hudik-Ross had already executed its second contract, one can clearly see that it was possible for Hudik-Ross to settle the labor dispute which it had created. The record is void of any suggestion that Hudik-Ross attempted to negotiate a compromise with the union under which the union would have agreed to install the climate control units in exchange for extra pay or other special benefits.[24] If the Board's finding that the union's

[24] Hudik-Ross was free to engage the union in negotiations either before or after it had accepted the subcontracting work. Such negotiations could have centered on an appropriate compromise payment that employees would receive for installing the prefabricated units, although other bargaining solutions were possible. For example, when the collective bargaining agreement was originally accepted the union may have given up demands for additional vacation time or other fringe benefits in order to receive the work preservation guarantee; Hudik-Ross could have achieved a settlement with the union by making concessions on such matters as a *quid pro quo* for the union's relaxation of the strictures of Rule IX. Alternatively, Hudik-Ross could have sought an arbitrated solution of the controversy. We cannot understand how, in the absence of such initiatives, Hudik-Ross may be labeled an innocent bystander. The Board appears to place the burden of finding such peaceful resolutions on the union, but we believe that Hudik-Ross, which was the culpable party in generating the controversy, had an obligation to reconcile its action with its contractual commitments. If Hudik-Ross desires protection from work preservation pressures in the future, it need only negotiate an agreement that incorporates a no-strike provision and that stipulates that such dis-

purpose in refusing to install the units was work preservation was correct, it can be assumed that the union would have accepted a payment from Hudik-

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putes will be submitted to arbitration. *Cf. Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970). However, no such provision precluded the work stoppage in this case, *see* note 23 *supra*, and it is improper for the Board to limit the union's arsenal of weapons as a matter of law. *Cf. NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 497-98 (1960). And although the dissent might believe it is "preferable" to resort to such peaceful mechanisms for resolving work preservation controversies, *see* dissenting op. at n.66, there is no justification in the Act for asserting that arbitration must be employed or that only a suit for contract breach is proper in the circumstances of the case *sub judice*, *see* note 38 *infra*; if the employer seeks to exclude certain instruments from the union's armamentarium, the collective bargaining process accords him an adequate and appropriate mechanism for doing so.

What would appear to be a paradigmatic voluntary vehicle for peacefully settling work preservation disputes, both allowing the subcontractor to bid for construction contracts involving prefabricated products and guaranteeing union compensation for an employer's breach of his collective bargaining agreement, was executed by several of the parties involved in *Associated General Contractors of California, Inc.* v. *NLRB*, *supra* note 3. There a trade council composed of 17 local unions and a trade association of employers in the construction industry had negotiated a work preservation agreement; if a union representative believed that the agreement was being violated, the union could require the employer to cease doing the contested work, but only for a period of 72 hours, while a joint arbitration board investigated the merits of the claim. After the expiration of 72 hours, the employer could resume work whether or not the investigation was complete. The arbitration board could make a variety of appropriate awards against an offending employer, including "pay-[ment of] the equivalent in wages and fringe benefits lost by employees * * *" into the union's pension fund. Nevertheless,

Ross to the employees to compensate them at least in part for the employer's breach of the bargaining agreement. Unions presumably seek agreements to preserve for their members the work which they have traditionally performed in order to maintain the income level of the members. Evidence that the union was unwilling to permit its members to install the prefabricated units even if they were paid for the work they lost by the prefabrication would call into question the Board's finding that the union's objective was merely work preservation; it would suggest that the union desired to boycott Slant/Fin's goods for some other reason, such as that firm's labor relations policies. However, such evidence was not adduced and, given the Board's finding that the union's purpose was work preservation, we cannot speculate as to its existence.[35]

Of course, Hudik-Ross might prefer to terminate its subcontract with Austin or pressure Austin to

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the court in that case found the arbitration board's assessment against the offending employer of approximately $560 to be improper since it determined that, to the extent the agreement covered work not within a subcontractor's legal control, it was a prohibited "hot cargo" clause in violation of § 8(e), and that enforcement of that clause constituted a violation of § 8 (b) (4) (B).

[35] There was no evidence that the union would have installed the Slant/Fin units if the employees who worked on the internal piping off the jobsite had been organized in an affiliated labor organization. Nor was there any evidence that the union's actions were motivated by, or that the union was familiar with, the organizational status of the Slant/Fin employees. *Cf. National Woodwork*, 386 U.S. at 646.

change its specifications for premachined climate control units rather than to negotiate with its employees as to alternatives for compensating them for their lost work. However, the fact that such a decision might have adverse effects on other employers like Austin and Slant/Fin does not transform an involved employer like Hudik-Ross against whom pressure is exerted into an innocent neutral.[36] For as

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[36] Congress was concerned with the injury suffered by neutral employers, but only where the injury resulted from the use of a secondary boycott. Almost every strike causes economic loss to one or more employers who are unconcerned with the labor dispute. A coal distributor may go bankrupt because of a coal strike. A small steel fabricator may be forced to close his doors because of a major steel strike. Such economic losses as these far outweigh the losses caused by secondary boycotts. Yet Congress has not sought to aid these neutrals * * *. This point is significant—and sometimes overlooked—because it shows that, while harm to a neutral is an essential ingredient of a secondary boycott, such injury is not by itself objectionable in the eyes of the legislature.

Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L. J. 727, 732 (1951), *quoted with approval in* Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1411-12 (1962). *See also* Note, *supra* note 3, 77 YALE L. J. at 1416-17. The dissent, however, apparently fails to distinguish between the impermissible *objectives* of secondary activity and the permissible *effects* of primary activity. *See, e.g.*, dissenting op. at 36 (manufacturer may be "materially affected"); *id.* at 50 (referring to "secondary effects of impermissible magnitude"); *id.* at 58 ("prohibited secondary effects and objects"); *id.* at nn.78 & 87. *See also Local 636, supra* note 16, 139 U.S. App.D.C. at 168-69, 430 F.2d at 909-10.

Our conclusion as to the legality of the union's activity might be different if the union actively sought termination of the Slant/Fin contract by exerting pressure directly against

the *National Woodwork* Court teaches, in enacting the proviso to Section 8(b)(4)(B) Congress made it clear that even a strike which would inevitably have an adverse impact on a secondary employer, like the National Woodwork Association member in that case who had contracted to sell prefabricated doors, is not proscribed by Section 8(b)(4)(B) if the employer

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Austin. *Cf. National Woodwork*, 386 U.S. at 630-31. In such circumstances, termination of that contract would not simply be an ancillary effect of the union's primary action, but an objective whose legality would have to be assessed independently. If Hudik-Ross is recognized as the primary employer for purposes of this work preservation dispute, the Board might reconsider whether Austin might appropriately be held to be a neutral party against whom economic pressure could not be directly applied. *See* note 44 *infra*. We note, however, that contrary to the assertions of the dissenting judges, *see, e.g.*, dissenting op. at 5, 10-11, 36, the mere fact that on a single occasion the union "informed Austin * * * that it would not let Hudik install the climate control units involved," JA at 254, does not constitute sufficient evidence to indicate that impermissible pressure was directed against Austin. Indeed, in simply informing the general contractor, contemporaneously with the arrival of the prepiped units on the jobsite and the initial notification of Hudik concerning the union's belief that the work was guaranteed to it by Rule IX, that the union would not install those units "because the piping inside the units was steamfitters' work," *id.* at 235, the union was doing no more than Hudik-Ross should have done in apprising Austin of the fact that Hudik-Ross' conflicting contractual commitments had generated a labor controversy at the jobsite. However, we nevertheless leave the question of whether there are additional indicia that the union's pressures were actually directed against Austin (and that Austin was a neutral in the dispute) open for the Board's consideration on remand.

struck is not an innocent neutral to the union's dispute.[37]

The Board's right to control doctrine is a continuing attempt to circumvent the congressional proviso and is inconsistent with the Court's analysis in *National Woodwork*. Moreover, it is a continuing inducement for employers to violate their bargaining

[37] 386 U.S. at 627. The Board contends that these possible effects cannot be deemed ancillary because "it is impossible to achieve [them] except by the forbidden means of forcing another independent contractor to change its policy or terminate a business relation." Brief for the NLRB at 26. However, as we stressed in our discussion of Hudik-Ross' neutrality, it was possible for Hudik-Ross to effectively satisfy the union's demands without affecting the contractual rights of any third party. Moreover, the mere fact that meeting a union's demands requires termination of contracts with third parties does not invariably indicate the presence of secondary activity. *See National Woodwork*; pp. 33-36 *infra*. The dissent, like the Board, apparently also fails to comprehend that work preservation clauses are essentially fashioned to preserve employees' wages, and that negotiated settlements, within a subcontractor's power to achieve, may be arrived at in order to compensate the employees for the subcontractor's breach of his collective bargaining agreement. *See, e.g.*, dissenting op. at 6-7 (presuming disputed work would actually have to be redone rather than resolved through a monetary settlement); *id.* at 11 (only Austin could comply with union's demands); *id.* at 15 ("absurdity" to believe union pressure directed against Hudik, which could not meet demands); *id.* at 24 (demands could only be met by dismantling manufactured articles at jobsite and redoing work); *id.* at 38 ("Hudik's alternatives were either to bid on the Norwegian Home contract in spite of the contractual conflict or to have insufficient work for its employees"); *id.* at 41-42 (dispute cannot logically be with subcontractor, who cannot meet demands); *id.* at 44, 59 & nn.66 & 74.

agreements. If employers do not want work preservation clauses to cover prefabricated units, they should not sign bargaining agreements with such clauses unless they so state. And when an employer gets himself into a bind, as did Hudik-Ross, he should arbitrate or negotiate his way out. Having the Board bail him out is to demean the National Labor Relations Act by encouraging deliberate, if not always planned, violations of bargaining agreements.[38]

[38] The Board, apparently cognizant of the inequities produced by its right to control doctrine in a case such as the present one, indicates that "the doctrine does not foreclose a union from enforcing a work preservation provision against an employer who lacks control of the work through a lawsuit or contractual arbitration procedures." Brief for the NLRB at 5 n.4, *citing Koch*. *See also* dissenting op. at 53-58 & nn.66, 95, 101, 106. *Koch*, in suggesting that the union's "remedy may well lie in a civil suit for breach of contract," *see* 201 NLRB at 63, cited *Local 1976, Carpenters* v. *NLRB* [*Sand Door*], 357 U.S. 93, 108 (1958), as support for that position. (Nor does the dissent cite any additional support.) It is sufficient to observe that the suggestion—that an agreement to preserve work from *nonjobsite* prefabrication is legal and enforceable in court even though it obligates the employer to do that which the union could not exert economic pressure to force the employer to do—is completely untenable in light of the congressional overruling of *Sand Door* by the passage of § 8(e) and the *National Woodwork* Court's formulation of the *in pari materia* relationship of §§ 8(e) and 8(b)(4)(B). *See* 386 U.S. at 644-45 (majority opinion); *id.* at 649 (memorandum of Mr. Justice Harlan) ("§ (e), it is agreed, is to be taken *pari passu*" with § 8(b)(4)(B)); *id.* at 660, *quoting Ohio Valley Carpenters*, 136 NLRB 977, 987 (1964) (Stewart, J., dissenting) ("there is little point and no logic in declaring an agreeemnt lawful

In its brief to this court, the Board vigorously asserts that *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951), mandates a different conclusion than the one we have reached. We find that this reliance on *Denver* is misplaced. The *Denver* Court sustained a Board finding that a construction union had violated Section 8(b)(4)(B) by striking

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under 8(e), but in finding its enforcement condemned under 8(b)(4)(B)").

It is thus inescapable that approval of the Board's right to control test necessarily would preclude a successful union suit for breach of a work preservation agreement whenever the employer who breached the agreement did not have legal control over the work the union desired preserved. *See e.g., Associated General Contractors of California, Inc.* v. *NLRB, supra* note 3, For employees dealing with employers regularly in such a position, collective bargaining and other concerted efforts to protect their traditional work and income from "onrushing technological change," *see National Woodwork*, 386 U.S. at 640, would be substantially undermined. Though we do not necessarily believe that the tug and pull of collective bargaining and concerted economic activity provide the ideal means to accommodate the job and income security of American laborers with the efficiencies of automation, we no more than the *National Woodwork* Court can say that Congress, without debate and study, intended by its enactment of §§ 8(e) and 8(b)(4)(B) to block this traditional and legislatively protected approach to such a serious industrial relations problem. *See generally* 386 U.S. at 640-44. And although the dissenters insist that our decision "increases the costs of construction projects suited to pre-prepared components," dissenting op. at 59, the *National Woodwork* Court has instructed us that such "economic and technological factors * * * are addressed to the wrong branch of government. * * * [Such arguments should be left] for Congress." 386 U.S. at 644.

against a general contractor in order to force him to terminate his contract with a subcontractor who employed nonunion labor—a classic secondary boycott. In the course of its opinion the *Denver* Court in dicta made several statements which the Board in its brief now maintains establish principles upon which the right to control test can be based:

> If there had been no contract between Doose & Lintner [the general contractor] and Gould & Preisner [the nonunion subcontractor] there might be substance in [the union employees'] contention that the dispute involved no boycott. If, for example, Doose & Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus disposed of the dispute. However, the existence of the Gould & Preisner subcontract presented a materially different situation. The nonunion employees were employees of Gould & Preisner. The only way that respondents [the union employees] could attain their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract. The result is that the Council's strike, in order to attain its ultimate purpose [full unionization of the construction site], must have included among its objects that of forcing Doose & Lintner to terminate that subcontract. * * * It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract.

341 U.S. at 688-89, *quoted in* brief for the NLRB at 8-9 (emphasis in original). Although this language obviously does not constitute a holding endorsing the Board's right to control doctrine since the general contractor in *Denver* had full legal power to assign the work which the union did not want nonunion employees to perform, the Board argues that this language should be applied in the instant case. The union's ultimate objective of work preservation, the argument runs, could only be attained by keeping Slant/Fin from completing the internal piping; this, in turn, could be done only through Austin's termination of its contract with Slant/Fin; the union's refusal to install the units must therefore have included among its objects that of forcing Austin to terminate the Slant/Fin contract; and such an objective would, given the dicta from the *Denver* opinion, render the refusal to install the units an illegal secondary boycott under Section 8(b)(4)(B).

As we have already indicated, we do not agree that termination of the Slant/Fin contract was a necessary intermediate step to satisfaction of the union's ultimate objective; Hudik-Ross could have resolved the dispute without affecting the contractual relationships of either Austin or Slant/Fin. But even accepting the factual premises of the Board's analysis, the quoted *Denver* language does not support the Board's right to control test. For a literal application of that language would have outlawed even the union activity in *National Woodwork*, where the struck employer was a general contractor with

full legal control over assignment of the work in dispute. In *National Woodwork* the carpentry union's objective of work preservation was only obtained by the general contractor's termination of his contract to purchase prefabricated doors from one of the Woodwork Association's members. But the *National Woodwork* Court, in upholding the union's actions, clearly did not consider this to be a proscribed secondary objective; indeed, that Court did not find it necessary to even consider the quoted *Denver* language.[39]

A closer examination of the *Denver* opinion reveals why that case was inapposite to both *National Woodwork* and the present case. The Board's quotation of *Denver* is less than candid, and reveals the danger of reducing a complex analysis turning upon "all the surroundnig circumstances" into a simplistic *per se* doctrine. For the above paragraph from *Denver* was introduced by this observation:

> In the background of the instant case there was a longstanding labor dispute between the Council and Gould & Preisner due to the latter's practice of employing nonunion workmen on construction jobs in Denver.

341 U.S. at 688. The Court, looking to the whole factual context of the controversy, thus recognized that the union pressure was directed against the labor

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[39] The dissenters in *National Woodwork* felt that *Denver* supported the prohibition of *all* work preservation clauses. *See* 386 U.S. at 651. Clearly the majority rejected this argument.

relations practices of the subcontractor, and that the strike against the general contractor was "tactically calculated to satisfy union objectives elsewhere." [40] In *National Woodwork*, as in our case, there was no indication that the substance of the dispute was with a third party. Given *National Woodwork* and the 1959 proviso added to § 8(b)(4)(B), the mere fact that the primary employer, in order to settle the dispute between himself and his employees concerning his "labor relations * * * *vis-à-vis* his own employees," [41] might be forced to terminate his contract with such a third party cannot alter this conclusion.[42]

III

We do not think that an employer who is struck by his own employees for the purpose of requiring him to do what he has lawfully contracted to do to benefit those employees can ever be considered a neutral bystander in a dispute not his own.[43] We recognize, of

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[40] *National Woodwork*, 386 U.S. at 644.

[41] *Id.* at 645.

[42] We also note that both here and in *National Woodwork* the union was applying economic pressure to enforce a valid contractual provision between its members and their employer. In *Denver* action was not taken pursuant to any lawful bargaining agreement.

[43] "Strongly held opposing views have invariably marked controversy over labor's use of the boycott to further its aims by involving an employer in disputes not his own. But congressional action to deal with such conduct has stopped short of proscribing identical activity having the object of pressuring the employer for agreements regulating relations between him and his own employees." *National Woodwork*, 386 U.S. at 620.

course, that a strike may have more than a single objective and may thus violate Section 8(b)(4)(B) if even one objective is a prohibited secondary one."

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[44] The Board maintains that this circuit and those other courts which have rejected the right to control doctrine have improperly converted the search for proscribed union activity from an analysis of whether *an* object of the union is secondary to an analysis of whether the *principal* object of the union is secondary. *See* brief for the NLRB at 27-28. The Board thus criticizes these courts because they "seem to conclude that if the union is seeking to enforce a valid work preservation clause against the employer who signed it, then in every instance, *without further inquiry*, such activity is primary because motivated by a work preservation objective and enforced against the immediate employer." *Local 438, Plumbers & Pipe Fitters, supra* note 4, 201 NLRB at 62 (footnote omitted; emphasis added). *See also, e.g.*, dissenting op. at 45-46 & nn.87 & 102. We must respectfully inform the Board that it has totally misunderstood the import of our prior decisions and, we presume, those of our sister circuits. Admittedly, the Board's statement is correct to the extent that under those circumstances we presume, absent evidence to the contrary, that the union's activity is primary and lawful and that the employer's mere lack of legal control over the work does not overcome that presumption. It is also true that, when the pressure is exerted solely against the immediate employer, we would consider termination of the subcontract or the general contractor's contract with the manufacturer to be acceptable ancillary effects of the primary action. However, even when we find that the union's primary motivation is work preservation, we will hold its actions unlawful under § 8(b)(4)(B) if they are tainted by secondary objectives. Several examples can illustrate the differences of such situations from the present case.

The first situation would be one in which the union, in furtherance of a work preservation agreement with a subcontractor, not only refuses to handle prefabricated goods, but also exerts pressure directly against the general contractor to terminate its contract with the manufacturer. *Cf.*

However, we hold that in situations such as the present one, where there is a valid work preservation provision in a collective bargaining agreement and where a union refuses to acquiesce in an employer's violation of that agreement, it is reasonable to assume that the employer *can* comply in accordance

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NLRB v. *Local 825, Operating Eng'rs* [*Burns and Roe*], 400 U.S. 297 (1971). In such cases, it would be appropriate to consider the general contractor to be a neutral party since he should not be forced to investigate the collective bargaining agreements of each of his subcontractors and since he could presume that they would resolve their own disputes with their own employees.

A second situation would be one in which the union discriminates in its work preservation tactics on the basis of the organizational status of the manufacturer. For example, when a dispute arose over work preservation and the disputed work was performed by an affiliated labor organization, the union may have only sought compensatory pay and submitted the dispute to arbitration. Yet in similar circumstances, when the manufacturer's employees were nonunionized, the union may have struck against its employer, hoping it would pressure the general contractor to terminate the manufacturer's contract. Given such facts, the valid work preservation objective could be held to be tainted by the improper secondary objective.

We recognize that such secondary objectives will not often be found when the union's principal objective is work preservation. We merely wish to demonstrate that we are cognizant of the statutory mandate and that we will hold such secondary objectives to be unlawful should they be detected. However, given the Supreme Court's approval of work preservation clauses in *National Woodwork*, and the policy of allowing contending parties to support their demands through economic pressures, we do not find that a work preservation action such as the one in the present case necessarily has *per se* any unlawful secondary objective, although it may have severe effects on neutral employers.

with his prior commitment to his workers and that, absent more evidence than mere stoppage of work, the union's objectives are legitimate and the refusal to install the prefabricated materials is lawful.

We therefore conclude that in this case, as in *National Woodwork*, the union's refusal to install the prefabricated components must be deemed primary concerted activity not prohibited by Section 8(b)(4)(B) if it is determined, "Under all the surrounding circumstances," [45] that the sole objective of the union was to preserve for employees of the struck employer work they traditionally performed. Since the Board here found that the union's purpose was to preserve work which Hudik-Ross' employees had traditionally performed, and there is no substantial evidence, as distinguished from the Board's rationalizations, in this record that the union's purpose was also "to satisfy union objectives elsewhere," the Board's decision holding the union guilty of a Section 8(b)(4)(B) violation may not stand. However, in remanding in *Local 742*, *supra*, and *Local 636*, *supra*, we held that legal control in the struck employer over assignment of the work which a union professes a desire to preserve, while not alone dispositive, may be considered by the Board along with other factors suggested by the *National Woodwork* Court in determining the union's actual objective. In remanding here to give the Board an opportunity to reconsider its ruling in

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[45] 386 U.S. at 644.

this case,[46] we emphasize at the risk of repetition that the Board is not free to focus on Hudik-Ross' lack of control to the total exclusion of the circumstances which the *National Woodwork* Court stated might be relevant to the inquiry into the union's objective.[47] The Board may fashion its own formulations as to the relevance of certain facts to *National Woodwork's* test for distinguishing primary from secondary activity. But as we held in *Local 742*, *supra*, and *Local 636*, *supra*, the Board may not transform that test, directly or indirectly, into a vehicle for subverting the congressional purpose by focusing on only one among many potentially relevant factors.

Remanded for further proceedings.

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[46] For example, such a reconsideration might challenge the Board's assumption that the union was not in fact attempting to organize the Slant/Fin employees.

[47] The *National Woodwork* Court stated that the relevant "circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 *et seq.* (1964)." 386 U.S. at 644 n.38. In its analysis of the evidence supporting the Board's finding that the carpentry union's ultimate objective was work preservation, the Court stressed that the union "refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union." *Id.* at 646. In short, the substance, history, and motivation of the particular dispute must be examined, with particular emphasis on identifying the employer whose *labor relations* are being affected.

BAZELON, *Chief Judge, concurring*: I concur in Part III of the Court's opinion, in the bulk of its reasoning and in its judgment that the Board's "right to control" test is inconsistent with *National Woodwork Manufacturing Associaion* v. *NLRB*, 386 U.S. 612 (1967). My path to this conclusion makes it unnecessary for me to consider certain issues raised by the Board in its argument [1] and considered in the Court's opinion.

I.

The central dilemma presented by § 8(b)(4) is well known and needs no extended recital. The section purports to prohibit any inducement to force an employer "to cease doing business with any other person." [2] However, the objectives of every strike or job action "include a desire to influence others from withholding from the employer their services or trade." [3] The union by striking always wants to completely shut down the employer and cause the economic injury pursuant to that shut down. Similarly, the union is surely aware and must intend that those

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[1] *See* Brief for the NLRB at 8-10. This question pertains to the effect of a subsidiary holding in Denver Bldg. & Construc. Trades Council v. NLRB, 341 U.S. 675, 689-90 (1951) on the situation *sub judice*.

[2] National Labor Relations Act § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1970).

[3] Local 761, Electrical Workers v. NLRB, 366 U.S. 667, 673 (1961), (Frankfurter, J.). For this reason the oft-cited language in S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947) is hopelessly conclusory.

who are cut off from the employer's services by the strike will also be injured and that injury might well create a climate in which the union's demands will be met. For example, in a strike of the trucking industry, the hardest hit will be not the trucking industry but the producers of perishable commodities. The union surely intends that and surely expects that injury to help its cause. The strike weapon is not a mere contrivance of the courts nor is it permitted through legislative inaction. The strike weapon is explicitly preserved by Sections 7 and 13 of the NLRA. More than this, that weapon forms the base for the system of private ordering the NLRA promotes.[4] To forbid the use of this weapon or permit a reduction of its effectiveness without explicit legislative approval would radically shift the balance of advantage struck by Congress between union economic power and employer economic power. Courts were and are naturally hesitant to alter that balance and thus, with the Labor Board, sought to accommodate the right to strike with the prohibition on secondary boycotts.

The accommodation between Sections 7 and 13 and Section 8(b)(4) which the Board urges upon us focuses on the union's "secondary intent." If a union

[4] *See* National Woodwork Manuf. Ass'n v. NLRB, 386 U.S. 612, 640-43 (1967); NLRB v. Eric Resistor Corp., 373 U.S. 221, 234-35 (1963); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 490 (1960); N. Chamberlain & J. Kuhn, Collective Bargaining 391 (2d ed. 1965). *Cf.* American Radio Ass'n v. Mobile Steamship Ass'n, 95 S.Ct. 409, 424 (1974) (Stewart J. dissenting), *quoting* Local 20, Teamsters v. Morton, 377 U.S. 252, 260 (1964).

has an "intent" to achieve the secondary effects occasioned by its strike otherwise protected by Sections 7 and 13, then it follows that the union has engaged in a § 8(b)(4) "secondary boycott." If the union does not intend to achieve those effects but rather seeks only to achieve effects on the primary employer, then the strike is "primary" and not violative of § 8(b)(4). In the Board's words: "While not prohibiting 'the *incidental* effects of *traditional primary activity*,' Congress by Section 8(b)(4)(B) has 'barred as a secondary boycott union activity directed against a neutral employer, *including the immediate employer* when in fact the activity directed against him was carried on for its effect *elsewhere*.' . . . If a 'tactical object' of the union's conduct is a person other than the employer of the boycotting employees, the 'boycott [is] secondary in its aim.'"[5]

A moment's reflection will suggest the difficulty with this formulation. The union surely intends the secondary effects of all strikes. That secondary effect is part, indeed, in some cases the only operative part of the strike weapon. This observation, rejoins the Board, citing dicta in *Denver Building and Trades*,[6]

[5] Brief for the NLRB, at 7 *citing* National Woodwork Manuf. Ass'n v. NLRB, 386 U.S. 612, 632, 645 (1967). *See* Lesnick, *Job Security and Secondary Boycotts*, 113 U. PA. L. REV. 1000, 1015-18 (1965) for a leading academic formulatione of the "union intent" test.

[6] Denver Bldg. & Construc. Trades Council v. NLRB, 341 U.S. 675, 688 (1951). Of course, the Court is quite correct in noting on pages 25-27 that the Board has cavalierly lifted this *dictum* from its context. The literal import of the *dictum*

proves it is correct here in finding Local 638's activity was secondary, since "an object" (the precise statutory phrase of § 8(b)(4)) of Local 638's job action was to put pressure on the general contractor through a strike of its own employer, the "secondary", to force it to terminate business with the general. The obvious response is that this reasoning taken literally would outlaw all strikes, exactly what the "union intent" accommodation seemingly was designed to prevent. A union always intends that employers other than the immediate employer will be pressured by its strikes or job actions.

The Board attempts to limit the far reaching effect of its reasoning by applying it only when the primary employer has no "right to control" assignment of disputed work in work preservation controversies. The Board argues that in this limited situation it can reasonably presume that the union's economic pressure on the primary employer is intended to particularly affect the employer who does have the right to control assignment of the disputed work. The union's object must then be to pressure the employer who does have this right to control to satisfy the union's objective. This formulation essentially limits the Board's reasoning to the construction industry.[7] The

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is thus of absolutely no aid in resolving the issues presented in this case.

[7] The Board seems unaware of this fact and of the serious problems such an approach raises in terms of the over-all equity of the NLRA. It is largely for this reason that I would, if I were writing on a clean slate, adopt the views of

Board asks us to accept this reasoning as based upon its expertise in ascertaining union objectives and evaluating union conduct.

But can the Board's reasoning be limited to situations in which the struck employer has no right to control the disputed work? Assume the immediate employer *does* have the right to control assignment of the work. A strike to force him to exercise that discretion, i.e. change his purchasing policies, to assign the work to his employees has exactly the same effect as a strike to force him to stop doing business with an individual who, in the situation in which the immediate employer has *no* right to control, would have the discretion to assign the work to the disputing employees. We have consistently held that a strike to force a termination of business is no different from a strike to force a change in purchasing policies;[8] the language of the statute and common sense clearly support that view.[9]

Judge Fahy stated in Denver Bldg. & Construc. Trades Council v. NLRB, 186 F.2d 326, 335-37 (D.C. Cir. 1950), *rev'd*, 341 U.S. 675, 689-90 (1951). Judge Fahy's opinion would accommodate the peculiar structure of the construction industry to the intendment of § 8(b)(4). *See also* note 20 *infra*.

[8] *See, e.g.*, Local 5, Plumbers & Pipefitters v. NLRB, 321 F.2d 366, 369 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 921 (1964).

[9] *See* National Labor Relations Act § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1970) ". . . forcing or requiring any person to cease . . . handling . . . the products of any other . . . manufacturer. . . ."

For this reason the statement in H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), cited by the Brief for the NLRB

If the secondary effects of a strike of or job action against a primary employer are equal when the employer has right to control and when he does not have right to control, why is it that the union does not "intend" the secondary effects in the first situation but does in the second? Surely, the Board will not be heard to argue that since the primary employer can legally "satisfy" the union's demand in the first situation, the presumption as to "intent" is not applicable. The employer who has no right to control can also legally satisfy the union's demand by terminating the offending contract or paying off the union for its lost wages. Similarly, as the general contractor in the non-right to control situation can satisfy the union's demands by changing his own purchasing policies, so the manufacturer in the right to control situation can satisfy the union demands by constructing heating and cooling units such that threading and fitting is done on the job or by going out of business.

To this argument, I take it, the Board's only possible response is that its experience with union actions in the construction industry convince it that (a.) the

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at 9-10 n.5 and relied upon in Local 419, Carpet Layers v. NLRB, 467 F.2d 392, 397 (D.C. Cir. 1972), is not helpful in resolving the issues of this case. That statement is that Congress meant to protect employers who are "powerless to comply with demands giving rise to [secondary] activity. . . ." However, even if we were to assume that Hudik-Ross is a secondary, it certainly can comply with the union's demand by terminating business with Austin, just as a right to control employer can comply by altering his purchasing policies.

union is unconcerned with any secondary effect on a manufacturer, when the union's employer can assign it the work in dispute, but (b.) is specially and vitally concerned with the secondary effect on an employer who could assign the disputed work to the union. But surely the Board does not argue that the union does not intend that the manufacturer feel *no* effects of economic pressure on a right to control employer; nor by its own admission in this case does it argue that the union is specifically seeking to bargain with an employer who does have the right to control when the union's immediate employer does not. It is difficult to perceive how the Board's gradation of union intent can serve as any kind of a rational or definitive standard to distinguish a § 8(b)(4) violation: in both cases the union "intends" the secondary effect and surely makes use of that effect to gain its objective. It may be in other industries that the secondary effects of a strike are less important to a union than in, for example, the trucking industry. Does that make strikes in the trucking industry "secondary" and strikes in other industries "primary"? In any event, the Board has presented us with no record that unions in the construction industry are particularly inclined to manipulate the secondary effects of their primary strikes more in a non-right to control situation than in a right to control situation. Such a conclusion is not intuitively obvious to me: my own suspicion is that the unions intend to force everybody, everywhere to recognize their right to traditional jobs and if a strike of their primary employer pinches

some other entity which is ignoring the union's "right" then so much the better from the union's point of view. Thus, I am unwilling to rely on the Board's conclusory allegations of expertise when the illogic of its position is not overcome by a record supportive of that position. In these circumstances, I cannot conclude that the Board has successfully demonstrated that there is any distinction between the union's intent in situations in which the immediate employer has the right to control and the situation in which that employer does not.

My conclusion in this regard is buttressed by another consideration. Clearly, a union strike over failure to agree to an increase in wages or failure to comply with such an agreement does not become secondary activity simply because the employer's ability to pay is practically dependent on the price he himself receives from a third party. Yet only the third party has the "right to control" resolution of the dispute and thus, under the Board's reasoning, the immediate employer is a "secondary." The Board seeks to avoid this intuitively absurd result by stating that the inability to satisfy union demands must be "legal" not "practical" [10] in order to support the right to control test. But what principles support this distinction? One searches in vain. In-

[10] *See* Local 1694, ILA (Bd. of Harbor Comm'rs), 137 N.L.R.B. 1178, 1182-83 (1962), *aff'd*, 331 F.2d 712 (3d Cir. 1965). *Cf.* Local 438, Plumbers & Pipefitters (George Koch Sons), 201 N.L.R.B. 59, 62 (1973), *aff'd*, 490 F.2d 323 (4th Cir. 1973).

deed, the distinction between "practical" and "legal" power, never the most obvious of distinctions in the non-legal world, is attenuated to the point of disappearance when, as here, the "legal" inability of the immediate employer is caused by his own "practical" estimations as to the profit in entering a subcontract in derogation of his work preservation agreement. If the union decides, as an employer might well importune it to decide, to agree to a monetary settlement in lieu of compliance with the work preservation agreement, the immediate employer may find it necessary to seek aid from the general contractor in order to get the job moving. Can the Board really distinguish between "practical" and "legal" control over a labor dispute?

If the Board's presumption of secondary intent when the employer has no right to control is extended to situations in which the employer does have the right to control—as, in logic, it must be extended, as discussed above—the right to control presumption becomes not an accommodation between § 8(b)(4) and §§ 7 and 13 but rather an administrative repeal of the right to strike.[11] The Chamber of Commerce

[11] The Board is apparently waffling on the question of whether the union may strike the general contractor who in circumstances as those *sub judice* has the right to control. It first held that the union did have that right but the 9th Circuit rejected that holding on appeal. *See* Western Monolithics Concrete Prod., Inc. v. NLRB, 446 F.2d 522 (9th Cir. 1971). This Board position apparently motivated the refusal to issue a complaint in Connell Construc. Co. v. Local 100, Plumbers & Steamfitters, 43 U.S.L.W. 4657 (U.S. June 2, 1975), *rev'g*, 483 F.2d 1154, 1158 (5th Cir. 1973) and was

in its *amicus* brief quite unabashedly presses upon us that contention; job site strikes over work preservation issues should be outlawed because of their dis-

implicitly rejected by the Supreme Court's holding. The Board's apparent position seems manifestly inconsistent with the Act, *see* pp. 11-13 *infra*, and, as the Court notes in note 29, would seem to expand rather than contract the scope of labor disputes in contravention of the stated goal of § 8(b)(4). Thus, we are forced to the conclusion that when the immediate employer has no right to control, the union is deprived of the right to strike. This cannot be squared with Sections 7 and 13.

The Board offers solace to the union by stating that the union may enforce its contractual agreement with its immediate employer in a § 301 suit. *See* Local 438, Plumbers & Pipefitters (George Koch Sons), 201 N.L.R.B. 59, 63 (1973), *aff'd*, 490 F.2d 323 (4th Cir. 1973). Thus, the Board implies that the scope of § 8(b)(4) is broader than that of § 8(e). The Court in note 38 correctly notes that both the majority and dissent in *National Woodwork* held that § 8(b)(4) and 8(e) were to be construed *in pari passu*. Furthermore, the Board's position raises the intriguing question of whether the union may strike to require the immediate employer to pay damages for violating the concededly valid work preservation agreement. The only minimal rationality to the Board's position is provided by our recent holding in Local 223, Sheet Metal Workers v. NLRB, 498 F.2d 687 (D.C. Cir. 1974) which held that the validity of a work preservation agreement could only be determined at its inception. The Board could argue that since the work preservation agreement is valid and a later specific secondary intent could not void it, the courts should permit § 8(b)(4) findings in such situations to preserve the intent of § 8(b)(4). The most obvious response is that Judge Wilkey's opinion for the Court in *Local 223* does not hold that an agreement originally valid under § 8(e) may be *enforced* in all circumstances, only that the agreement itself cannot be *voided* because of one incident of secondary intent in enforcing that agreement. I conclude, as does the Court, that the Board must either completely outlaw the union's

ruptive effect. While I must commend the Chamber for its honesty of presentation, its argument was over-ruled in the most explicit terms in *National Woodwork* [12] and upon reflection is really no more than the old, discredited contention bandied about in the days prior to the Norris-LaGuardia Act. Accepting the Chamber's position would re-introduce the labor injunction through the fragile vehicle of § 8(b)

action or completely protect it. The Board is not authorized to initiate under §§ 8(b)(4) and 8(e) a compulsory arbitration scheme for the construction industry. That is a project for management and labor to resolve in collective bargaining. The Board's implied response that § 8(e)'s construction industry proviso should cover disputes of the sort we confront in this case must be rejected. *See* note 22 *infra*.

While the Board does not explicitly make the argument, one could argue that the principle of Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) should permit the Board to extend the compulsory arbitration schemes specifically approved in §§ 8(b)(4)(ii)(D), 10(k), 29 U.S.C. §§ 158(b)(4)(ii)(D), 160(k) (1970) (compulsory arbitration of work assignment and jurisdictional disputes) and in the construction industry proviso to § 8(e) (union and employer may agree to hot cargo clause but the clause may not be enforced through a strike if the subject of the agreement relates to job site work) to the facts of this case. I am not impressed with this potential argument since it restricts the right to strike by implication. Such restriction was permitted in *Lucas Flour* because of the union's own agreement to a plenary arbitration scheme. There is no such agreement in this case. *See* Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on* Sinclair v. Atkinson, 72 YALE L.J. 1547 (1963). *See also* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 388 (1974) (Douglas, J. dissenting); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

[12] National Woodwork Manuf. Ass'n v. NLRB, 386 U.S. 612, 644 (1967).

(4) and § 10(l). It is simply incomprehensible that Congress would intend such a result without altering Norris-LaGuardia or Sections 7 and 13; in any event, I for one would not bring back the doctrine of *Coronado* (II) and *Bedford Cut Stone* [13] without the most explicit Congressional statement that such was demanded by dictates of sound economic policy. Finally, the Board's right to control test must be rejected because the Supreme Court in *National Woodwork* expressly held that the union could use economic pressure for work preservation against an immediate employer who does have the right to control. As discussed above, there is no distinction between economic pressure against an immediate employer who does have the right to control and one who does not that is relevant to the purposes of § 8(b)(4). Therefore, *National Woodwork* requires us to reverse the Board's action as arbitrary and as inconsistent with the Act.[14]

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[13] *See* Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U.S. 37 (1927). *See generally* Winter, *Collectively Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963); note 21 *infra*.

[14] The sort of judicial review of administrative action involved in this case is not really a direct ruling on a "question of law"; nor is it a ruling on a matter outside of the agency's expertise. Rather it is a ruling that the agency in exercising its expertise in an area of mixed facts and law did not act reasonably in developing a rational interpretation of the Act. This form of judicial review is largely supervisory and should be sparingly used. *Cf.* Local 761, Electrical Workers v. NLRB, 366 U.S. 667, 672-74 (1961).

II.

Having said all this, I think it appropriate to make some brief remarks about what *is* proscribed by § 8(b)(4). That is not an easy task since the 80th Congress which passed that provision did not specify what the provision was meant to outlaw. All who read the Section agree it can not be taken literally. All who know the history of the Taft-Hartley Act realize that Congress surely meant to outlaw something that unions were engaged in. The project for the courts and the Board has been to formulate the scope of § 8(b)(4)'s proscription. It is instructive to consider the two areas in which the Board and the courts have with some exactitude delineated the scope of § 8(b)(4).

The first area involves those cases in which the union directly seeks to obtain a concession for a specific group of employees from an employer with whom it has no bargaining relationship under the NLRA *relating to those specific employees.*[15] An ex-

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[15] *See* NLRB v. Local 825, Operating Eng'r, 400 U.S. 297, 303-04 (1971); Local 814, Teamsters v. NLRB, 512 F.2d 564 (D.C. Cir. 1975); Local 419, Carpet Layers v. NLRB, 467 F.2d 392 (D.C. Cir. 1972); Local 1288, Retail Clerks v. NLRB, 390 F.2d 858 (D.C. Cir. 1968). *Cf.* Local 761, Electrical Workers v. NLRB, 366 U.S. 667, 674-79 (1961); Connell Construc. Co. v. Local 100, Plumbers & Steamfitters, 43 U.S.L.W. 4657 (U.S. June 2, 1975). *See also* American Radio Ass'n v. Mobile Steamship Ass'n, 95 S.Ct. 409, 420-21 (1974) (Stewart, J. dissenting). The Court in note 44 recognizes this rule. *Com-*

ample would be where a union pickets an employer with whom it has no collective bargaining agreement to prevent that employer from doing something that would affect the union. In such cases the union is in effect seeking to bargain with the third-party employer. When § 8(b)(4)'s proscription is stated in those terms, it is easily reconciled with the NLRA and particularly the Taft-Hartley Act as a whole. Such an attempt by the union to bargain with an employer, with whom it has no collective bargaining relationship in relation to the affected employees, would conflict with the policy of the Act of free choice for the actual employees of the employer so importuned as to whether they wish to be represented by a union; would conflict with the employer's actual or potential duty to bargain with his own employees; and could conflict with the union's concommitant duty to represent those employees. The employer may thus be forced to bargain with two unions and the union who seeks to force bargaining must represent two work forces, which may or may not have conflicting

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pare this rule *with* United Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965):

> But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on *other bargaining units*. . . . [T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units. . . . On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. (emphasis added)

interests.[16] The interloper union thus finds no protection in the Act for his bargaining. Indeed, one could construe such a bargaining attempt as a petition for recognition which is itself illegal unless done in conformity with the rather specific provisions of the Act governing recognitional activity.[17]

These same general policies of the Act may also explain the other area in which the courts and Board have reached agreement on the scope of § 8(b)(4)—any union attempts to obtain from its immediate employer an agreement to or practise of refusing to handle non-union goods or to work on jobs where non-union workers will be present violate § 8(b)(4).[18]

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[16] *Cf.* United Mine Workers v. Pennigton, 381 U.S. 657, 665-66 (1965); Local 419, Carpet Layers v. NLRB, 467 F.2d 392, 406-07 (D.C. Cir. 1972); Sperry Systems Mgmt. Div. v. NLRB, 492, F.2d 63, 69 (2d Cir.), *cert. denied, sub nom.* Local 445, Electrical Workers v. Sperry Systems Mgmt. Div., 95 S.Ct. 55 (1974). The one exception to this rule is the "allied employer" doctrine, *see* cases cited 467 F.2d at 401 n.20, which the Board seemingly recognizes as a limitation on its "right to control" rule. *See* Painters Dist. Council No. 20, 185 N.L.R.B. 930, 932 (1970).

[17] National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) (1970); *see* San Francisco Local Jt. Exec. Bd, Culinary Workers v. NLRB, 501 F.2d 794 (D.C. Cir. 1974); Note, *Recognitional and Organizational Picketing: Limitations on A Non-Certified Union*, 47 MINN. L. REV. 1031 (1963). Of course, if the union does not represent a majority of the relevant employees, any bargaining would violate § 8(a)(2), 29 U.S.C. § 158(a)(2) (1970). *Compare* Dallas Building Trades v. NLRB, 396 F.2d 677 (D.C. Cir. 1968).

[18] Washington-Oregon Shingle Weavers Dist. Council, 101 N.L.R.B. 1159 (1952), *aff'd*, 211 F.2d 149 (9th Cir. 1954);

Professor Lesnick criticizes these cases because they are insensitive to the subtleties of "union intent." [19] However, that criticism ignores what I perceive to be the real import of this rule. A union objective to promote unionization or for "aesthetic" reasons to refuse to handle non-union goods even if directed solely at the primary employer (although I would argue no union objective ever is in *intent*) is not protected by the Act since the Act is neutral toward unionization and affirmatively seeks to protect employee freedom of choice in deciding upon union representation. The union's objective, not its "intent"

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see Denver Bldg. & Construc. Trades Council v. NLRB, 341 U.S. 675 (1951). *See also* Local 636, Plumbers & Pipefitters (I) v. NLRB, 278 F.2d 858 (D.C. Cir. 1960); Marriott Corp. v. NLRB, 491 F.2d 367 (9th Cir.), *cert. denied sub nom.* International Ass'n of Machinists v. NLRB, 95 S.Ct. 146 (1974); Local 1976, Carpenters, 113 N.L.R.B. 1210 (1955), *aff'd*, 241 F.2d 147 (9th Cir. 1957) *aff'd on narrow issue*, 357 U.S. 93 (1958). The distinction between union signatory agreements such as discussed in the text and union standards agreements such as are in issue in this case has often been recognized by this Court. *See* Orange Belt Dist. Council No. 48 v. NLRB, 328 F.2d 534, 538-39 (D.C. Cir. 1964) and cases cited. *See also* Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959). The Board's reliance on Local 5, Plumbers & Pipefitters, 321 F.2d 366 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 921 (1964) is misplaced since that case involved a jurisdictional dispute between unions, which is substantially similar to a union signatory dispute. *Cf.* NLRA §§ 8(b)(4)(ii)(D); 10(k), 29 U.S.C. §§ 158(b)(4)(ii)(D); 160(k) (1970). *See also* NLRB v. Local 825, Operating Eng'rs, 400 U.S. 297, 305-06 (1971).

[19] Lesnick, *supra* note 5, at 1004-06.

to make tactical use of secondary effects, is illegal and "secondary" as a matter of law.

The relation of the proscription of § 8(b)(4) to the general policies of Taft-Hartley and the NLRA provides a more firm structure to the secondary boycott provisions, one more easily complied with and one more readily administered. It furthermore has the salutory effect of enhancing Congress' role as the ultimate arbiter of union power and employer power in the collective bargaining process. With attention thus directed to the *substantive desirability* of the union's bargaining objective, Congress may with the issue so framed give full consideraiton to the desirability of that objective in balance with its adverse secondary effects. On the other hand, if courts and the Board continue to focus on "union intent", Congress may be deterred from intervention by the heavily factual nature of the inquiry. The energies of management and labor will be spent on subtle questions of evidence while the central questions of the desirability of the objective as against its adverse effects will be submerged in judicial consideration of evidentiary presumptions such as the "right to control." A better institutional position for appellate courts is as a structuring agent, promoting rationalization and consistency in labor policy, and thereby framing issues for legislative and administrative consideration. The history of legislative-judicial-administrative dialogue is most impressive in those situations in which the judiciary considers the legality of a particular bargaining objective after the parties and

the Labor Board have formulated the issue and either applies existing legislative policy to that objective or in effect "remands" the issue to Congress for action.[20]

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[20] *Cf.* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

Congress when confronted with properly framed issues may take two approaches. First, it may directly restrict union economic power when used in pursuit of a particular bargaining objective. *See* §§ 8(b)(4)(ii)(D); 10(k), 29 U.S.C. §§ 158(b)(4)(ii)(D) 160(k) (1970) (compulsory arbitration over work assignment and jurisdictional disputes); § 8(b)(7), 29 U.S.C. § 158(b)(7) (1970) (time limitation for organizational picketing and the right to have a Board regulated election); § 8(b)(1), (2), 29 U.S.C. § 158(b)(1), (2) (1970) (limitations of union security objectives); and the provisos to § 8(e), 29 U.S.C. § 158(e) (1970) (union may bargain for agreement not to handle non-union goods or work with non-union workmen but may not strike to enforce such an agreement).

Second, Congress may take steps to mitigate the more harsh effects of union economic power. *See, e.g.*, National Labor Relations Act § 208, 29 U.S.C. § 178 (1970); Railway Labor Act, 45 U.S.C. §§ 154-63, 183-85 (1970); C. Summers & H. Wellington, Labor Law 845-883 (1968).

The "institutional" view of the role of the courts suggested in the text would also seem to mitigate the difficulties of judicial application of the stated purpose of § 8(b)(4)—the protection of "neutral" third parties. *See, e.g.*, National Woodwork Manuf. Ass'n v. NLRB, 386 U.S. 612, 627-28 (1967). These difficulties are illustrated by this case. The Board finds injury to neutral third parties in this case involving a small construction job in Brooklyn and proscribes that injury through § 8(b)(4). However, the Board would not and under current law could not redress through § 8(b)(4) the very real injury to neutral third parties caused by a nationwide truckers strike or a local public employees strike. When one compares the relative seriousness of the injuries to neutral third parties, one must certainly pause to consider whether

Finally, a relation of the proscription of § 8(b)(4) to the policies of the Taft Hartley Act is probably the best approximation of the true intent of the 80th Congress in passing § 8(b)(4) while leaving Sections 7 and 13, not to mention Norris-LaGuardia, unscathed.[21]

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judicial effort to control secondary effects through § 8(b)(4) is a fruitless if not Sisyphisean task. The inherent inequity in this task is made doubly obvious in "Right to Control" work preservation disputes since construction unions are the only apparent object of § 8(b)(4) in such circumstances due to the peculiar structure of the industry. *See* note 7 *supra*.

[21] *Cf.* National Labor Relations Act § 7, 29 U.S.C. § 157 (1970) ("Employees . . . shall also have the right to refrain from" collective bargaining); §§ 8(a)(1), (b)(1), 14(b), 29 U.S.C. §§ 158(a)(1), (b)(1), 164(b) (1970). *See also* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); notes 9 & 20 *supra*.

Another advantage of the view of § 8(b)(4) enunciated in the text is its correlation with anti-trust doctrine. This correlation has already been suggested in note 15 *supra*. It may also be seen in a comparison of Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); American Fed'n of Musicians v. Carrol, 391 U.S. 99 (1968); Local 24, Teamsters v. NLRB, 358 U.S. 283 (1959) *and* Local 1355, ILA (Tulse Hill), 146 N.L.R.B. No. 100, *rev'd on other grounds*, 332 F.2d 992 (4th Cir. 1964); C. Summers & H. Wellington, Labor Law 652 (1968). *See also* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969). The suggestion of this correlation is that if the union's substantive objective is within the scope of mandatory subjects of bargaining, it is exempt from both anti-trust and secondary boycott proscription. For another interesting comparison suggested in part by Professors Wellington and Summers, *compare* Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937) *with* Douds v.

As to the result in this case, I concur in Part III of the Court's opinion which establishes that if the union is striking its employer over the violation of

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Metropolitan Fed'n of Architects, 76 F. Supp. 672, 676-77 (S.D.N.Y. 1948) *and* the Court's opinion in this case. Indeed, the central definition of "secondary" intent for § 8(e) developed in *National Woodwork* and applied by this Court in Local 223, Sheet Metal Workers v. NLRB, 498 F.2d 687 (D.C. Cir. 1974) is a result of the Supreme Court's construction of its *antitrust* opinion, Allen Bradley Co. v. Local 3, Electrical Workers, 325 U.S. 797 (1945). *See also* Westinghouse Electric Corp., 150 N.L.R.B. 1574 (1965).

This correspondence between present anti-trust doctrine and § 8(b)(4), which focuses on the union's bargaining objective, is consistent with the common law position on secondary boycotts—that union boycott activity is illegal unless justified by a "privilege." *See* Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896); Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). The NLRA which protects mandatory collective bargaining over certain subjects supplies the "privilege" which protects the union's boycott activities. *Compare* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Silver v. New York Stock Exchange, 373 U.S. 341 (1963) *and* cases cited S. Oppenheim & G. Weston, Federal Anti-Trust Laws 96-98 (1968) *with* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) *and* United States v. Nat'l Ass'n of Real Estate Bds., 339 U.S. 485 (1950). Senator Taft stated expressly that the purpose of § 8(b)(4) was to "reverse the effect of the law as to secondary boycotts" by restoring the common law position. II Legislative History of the Labor Management Relations Act, 1947, at 1106 (1948).

The Supreme Court appeared to recognize the relation of § 8(b)(4) doctrine & anti-trust doctrine in Connell Construc. Co. v. Local 100, Plumbers & Steamfitters, 43 U.S.L.W. 4657 (U.S. June 2, 1975). There the union engaged in seemingly flagrant secondary activity, the Board refused to issue a complaint in an identical case involving the same union and a different subcontractor—either on the basis of its "right to

a lawful collective bargaining agreement, the union may not be found in violation of § 8(b)(4) unless the objects listed in footnote 44 taint the union's strike. While I am less convinced than the majority that the Board deserves another opportunity to determine whether any of those objects tainted Local 638's strike, I concur in its reasoned judgment that a remand is the proper disposition at this time.[22]

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control" doctrine or on the basis of an expansive view of § 8(e) —and the injured employer filed an anti-trust complaint. If anti-trust doctrine and secondary boycott doctrine are fully correlated, then an tnti-trust cause of action can properly be viewed as a third party remedy when the Board refuses to issue a complaint. *Cf.* W. J. Milner & Co. Local 349, Electrical Workers, 476 F.2d 8 (5th Cir. 1973). *See also* Connell Construction Co. v. Local 100, Plumbers & Steamfitters, *supra* at 4667 (Stewart, J. dissenting).

[22] The Board makes one final implied argument. It is suggested that the construction industry proviso to § 8(e) by approving certain types of job sites agreements but forbidding economic pressure brought to enforce such agreements would be undermined by our holding in this case. By permitting economic pressure in support of an agreement which would fall under the proviso to § 8(e) if it involved an agreement with the general contractor, it is argued, this Court is ignoring the Congressional assumption that such agreements may not be enforced through economic pressure. This argument must be rejected. First, a close reading of the legislative history, particularly the Congressional consideration of *Denver Bldg. Trades*, indicates the only subject of Congressional action was union signatory agreements, economic pressure in support of which would *not* be approved by my reasoning or the Court's. *See* Conf. Rep., *supra* note 1, at 39; Connell Construction Co. v. Local 100, Plumbers & Steamfitters, 43 U.S.L.W. 4657, 4661-63 (U.S. June 2, 1975) *citing* Local 695, Teamsters v. NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966). Second, we will not extend such a narrow Congressional

balance of union and employer economic power beyond the specific subject which motivated Congressional action, when such extension will reduce the effectiveness of the strike weapon. *See* note 11 *supra*.

I make one caveat to the reasoning of this opinion. The case *sub judice* concerns union pressure on an allegedly third party employer proscribed by § (b) (4) (ii) (B), and not union pressure on other employees as proscribed by § 8(b) (4) (i), except to the extent the union here attempted to persuade its own members to participate in the job action. I have not fully explored whether the reasoning applied to § 8(b) (4) (ii) (B) should apply exactly to § 8(b) (4) (i).

MACKINNON, *Circuit Judge*, with whom TAMM, ROBB, and WILKEY, *Circuit Judges*, join, *dissenting*: We review here a determination of the National Labor Relations Board that Enterprise Association engaged in an illegal secondary boycott as proscribed by section 8(b) (4) (B) when it sought to enforce its interpretation of a clause in its collective bargaining contract wherein the employer agreed that certain pipefitting operations would be performed at the job-site. The majority opinion concerns itself almost entirely with the validity of the "right-to-control test" which it asserts the Board used as the sole test to judge the legality of the Union's action. I disagree with the majority's assessment as to the use of the test, which seems to me thoroughly compatible with the Supreme Court's *National Woodwork* decision,[1] but more fundamentally this opinion concludes that the majority has taken an unduly restrictive view of the scope of section 8(b) (4) (B).

I. THE PROHIBITION AGAINST SECONDARY BOYCOTTS

The central issue in this appeal revolves around the secondary boycott provisions of the Labor-Management Relations Act. The statute prohibiting such boycotts was first enacted in 1947 as section 8(b) (4) (A) of the Taft-Hartley Act. It was amended by the Landrum-Griffin Act in 1959 and at that time

[1] National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612 (1967).

redesignated as section 8(b)(4)(B).[2] It is this portion of the statute that must be applied to the facts of this appeal, which comes to us following written opinions by an Administrative Law Judge (ALJ) and by a unanimous three-member panel of the National Labor Relations Board.[3]

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[2] Here follow the 1947 provisions with the 1959 amendments underlined. Provisions stricken in 1959 appear in brackets.

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage [the employees of] any [employer] *individual employed by any person engaged in commerce or in an industry affecting* commerce to engage in, a strike or a [concerted] refusal in the course of [their] *his* employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; *or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,* where *in either case* an object thereof is—

* * * *

(B) forcing or requiring any [employer or self-employed or other] person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing* . . . (61 Stat. 141, 73 Stat. 542).

[3] 204 NLRB 760 (1973).

A. *Factual Background.*

The rendition of the following basic facts by the ALJ is not in dispute[4]:

Slant/Fin Corporation (hereafter Slant/Fin), manufacturer of the air-conditioning units, was a New York Corporation with its principal office and place of business in Greenvale, New York.

Austin, the general contractor and engineer for the Norwegian Home for the Aged, was an Ohio Corporation with its principal office and place of business in Roselle, New Jersey. Austin engaged in providing and performing engineering, general contracting and related services in various states of the United States, including New Jersey and New York.

Hudik-Ross Co., Inc. (hereafter Hudik), the heating and air-conditioning subcontractor, was a New York Corporation with its principal office and place of business in New York City. It engaged in providing heating, ventilation, air-conditioning and related services at various construction job sites in New York state. The Enterprise Association, Local Union No. 638 (hereafter the Union, also the Steamfitters), affiliated with the International Plumbing and Pipefitters Union, AFL-CIO, operated in New York City and is a labor organization as defined by section 2(5) of the Labor-Management Relations Act.

Austin was designated general contractor and engineer for the construction of the Norwegian Home in New York City. In that capacity, Austin prepared

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[4] J.A. 234; *see also* J.A. 253.

the engineering job specifications, employed directly certain Union construction workers, and subcontracted the electrical, plumbing, heating, ventilation and air-conditioning work to various subcontractors.

The building specifications were dated November 29, 1971. With respect to the heating and air-conditioning units they provided:

> Furnish at the jobsite Slant/Fin Climate Command Air Conditioners. The unit shall be *complete* with cabinets, filters, cooling chasis, heating coil fans, main water flow and condensate assembly . . . .
>
> * * * *
>
> *The main flow and condensate assembly shall be factory installed as an integral part of the unit by the manufacurer . . .*
>
> * * * *
>
> Manufacturer shall furnish a written guarantee for a period of one year after completion of installation . . . .
>
> * * * *

(J.A. 233). (Emphasis added).

These specifications required the subcontractor (Hudik) to install air-conditioning units as manufactured by Slant/Fin *complete* with the factory installed "waterflow and condensate assembly," *i.e.*, with internal prepiped waterflow and condensate assemblies. With this prepiping, the equipment would be guaranteed by the manufacturer for one year.

Hudik received the subcontract for the heating, ventilating and air-conditioning work as the result

of competitive bidding and on January 14, 1972, entered into the subcontract with Austin to install the heating and air conditioning in the building according to the specifications. The Administrative Law Judge found that Hudik was aware of the above-quoted specifications prior to bidding.[5]

Hudik had been a union contractor in New York City for many years and its collective bargaining contract with the Union provided for compliance with the following rule:

> RULE IX
> CUTTING PIPE AND
> MAKING UP FITTINGS
>
> * * * *
>
> Radiator branches, convector branches and coil connections shall be cut and threaded by hand on the job in accordance with Rule V.
>
> * * * *

(J.A. 213). The Union contends that Rule IX required Hudik to assign to its members on the jobsite the work of cutting and threading certain "internal piping" in the air-conditioning units. But the building specifications with which Hudik was obligated to comply required the installation of the completed units as delivered by Slant/Fin with their internal piping for main waterflow and condensate assembly already assembled by the manufacturer. The subcontract called for the installation of 114 air-conditioning units at a total cost of $51,000 (J.A. 192).

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[5] J.A. 234.

On June 22, 1972, the air-conditioning units arrived at the jobsite and were unloaded. Hudik's job foreman contacted Daly, the Union's business agent, and the two men proceeded to inspect the units. The next day, Daly told *Austin's* project superintendent that members of the steamfitters' union "would not install the Slant/Fin units because the *piping inside* the units was steamfitters' work and that Rule IX of their contract with Hudik called for them to do the inside piping work on site" (J.A. 235, emphasis added). Daly conveyed the same message to the Hudik superintendent and to Frank Hudik. Hudik pointed out to Daly that the units had been preassembled and pretested at the factory and that the building specifications called for installation of the complete Slant/Fin units.[6]

Nevertheless, because the internal piping had been done at the factory, the Union refused to install the Slant/Fin units, and as a consequence held up completion of the building. Austin filed an unfair labor practice charge against the Union alleging that it was engaged in an illegal secondary boycott prohibited by section 8(b)(4)(B). The Union had never met with Slant/Fin and there was no evidence that the Union had ever tried to organize Slant/Fin's employees.

There was testimony that on other jobs the Union had fitted pipe on similar American Standard air-conditioning units on the jobsite, but a witness for

[6] The complete units were factory prepiped, tested and guaranteed by Slant/Fin, the manufacturer. J.A. 233, 235.

the pipefitters pointed out that those units did not have the bypass arrangement or condenser contained in the Slant/Fin equipment. (J.A. 151-55). The engineering sketch of the manufactured unit, see Figure 1 (J.A. 196, 224, 225), indicates that the work the local Union claimed included a number of integrated and necessary *internal* parts of the complete air-conditioning unit produced and guaranteed by Slant/Fin. The disputed work was substantially more than just cutting and threading the pipe to connect the air-conditioning units to the basic piping that ran throughout the building. It included connecting up two valves and a condenser (J.A. 196, 224, 225)—in other words, the Union sought to perform final as-

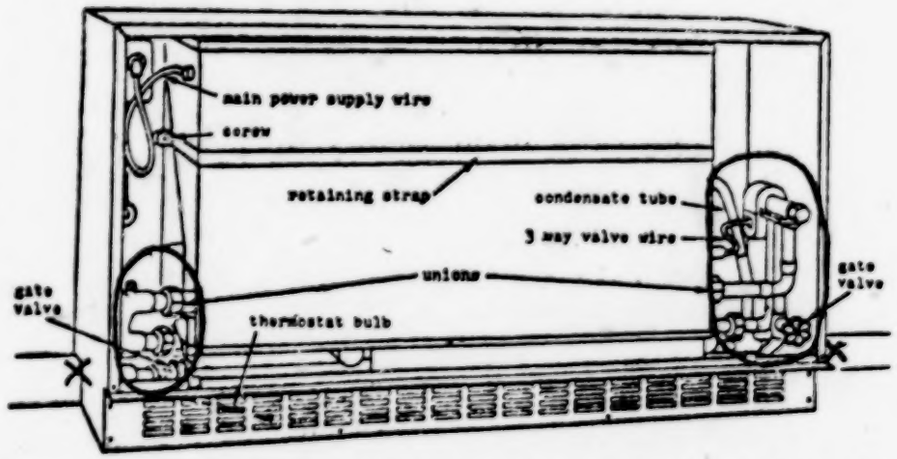

Figure 1. At the hearing before the ALJ, Robert Grand, District Superintendent for Austin, drew circles around internal piping at either end of a diagram of the Slant/Fin unit to indicate the location of the "main water flow and condensate assembly piping." (J.A. 78-79). Subsequent witnesses testified that this piping was guaranteed to the Union by Rule IX and was the source of the dispute between Enterprise and Hudik. (J.A. 122, 130, 167-69). Frank Hudik drew "x's" on the diagram at both ends of the unit to indicate the location of piping necessary for installation of the completed Slant/Fin assembly. (J.A. 123-24).

sembly tasks on *internal parts* of the air-conditioning units. See Figure 1. To comply with the demand that the local Union perform that internal work would require the unit to be dismantled, the assembly surrounding the two valves and the condenser to be taken apart, and the local workmen to reconstruct the internal piping, fit new pipe to the valves and condenser, connect them and then reassemble the complete unit. Whether the manufacturer would be expected to furnish the valves and the condenser was not stated.

B. *The Decision of the Administrative Law Judge*

The finding critical to this appeal in the decision by the ALJ stated:

> 3. By inducing and encouraging individuals employed by Hudik to engage in a strike and in a refusal in the course of their employment to handle and work upon factory piped heating and cooling units manufactured by Slant/Fin, which Hudik was required by its contract with Austin to install in the Norwegian Home being constructed by Austin as engineer and general contractor, and by coercing and restraining Hudik, an object thereof being to force or require Hudik to cease using factory piped heating and cooling units and cease doing business with Austin and Slant/Fin, Respondent had engaged and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.[7]

[7] The decision of the ALJ stated another possible ground for decision: that he interpreted Rule IX to refer only to

(J.A. 243). In his opinion the ALJ analyzed the facts and set forth his reasoning in considerable detail,[8] and as required by both the Supreme Court's

"pipe within Hudik's control and which could be cut on the job." The ALJ explicitly declined to rely on this conclusion in his ruling. J.A. 237. *See also* Rule IX at p. 4 *supra*, and for text of the decision of the ALJ on this point *see* text, at p. 24 *infra*. Hudik raised the same point initially with the Union agent (Daly) when the issue first arose:

> Q. Did you tell Mr. Daly that Rule 9 did not apply to this unit because of the nature of its construction?
> A. (Hudik) Yes.
> Q. Did you say that was so because the work had been pre-assembled in Slant/Fin's factory?
> A. Yes.
> Q. That was the reason why you told Mr. Daly that, because it had been pre-assembled in the Slant/Fin factory?
> A. Pre-assembled and pretested.
> Q. In the Slant/Fin factory?
> A. Correct.

J.A. 167-68.

[8] "In the instant situation, since Hudik is neither the manufacturer of prepiped units (Slant/Fin) nor is it the engineer and general contractor (Austin) who specified the use of particular prepiped units, it is apparent that the Union's dispute or problem is with Slant/Fin and Austin. Enforcing a union contract with Hudik to prevent Hudik's installing prepiped units that were neither manufactured nor specified by Hudik is simply a use of Hudik as an instrumentality or means of exerting pressures against Slant/Fin and Austin. The Union's real problem and dispute is with the manufacturer of prepiped units and the engineer who specifies that such units are to be used. That Hudik is only a means or instrumentality for exerting pressure against Slant/Fin and Austin with whom

decision in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967), and sound

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the Union has its primary dispute, will appear if we consider two possible situations.

"Example A is where Hudik or similar union subcontractor is invited to bid on a job where prepiped units are to be installed. The Union reminds Hudik of the terms of the union contract requiring on the job piping. Hudik therefore does not bid and does not get the job, or if he does bid and obtains the subcontract, his union employees refuse to install the prepiped units. The construction site, however, in Example A, is in an area where the engineer and general contractor are then able and willing to secure a non-union subcontractor or a subcontractor employing members of a union who are not adverse to installing prepiped units. The job is therefore completed without Hudik and his employees. Assume that this pattern is repeated on other jobs in the area and with the same results. It is clear therefore that in example A, the Union's problem and dispute is not with Hudik since Hudik, despite voluntary or involuntary compliance with the union contract, is an ineffective means or instrumentality 'under all the surrounding circumstances' for exerting pressure against the manufacturer of prepiped units or the engineer specifying their use. The Union's problem or dispute is with the last two mentioned parties, not with Hudik. Union enforcement of the Union-Hudik contract in Example A does not preserve work for the Union but serves to deprive Hudik and its employees of work. The Union does not exist as an organization whose purpose is to deprive its members of work. It is apparent that the Union's dispute is not with Hudik but that it is with the manufacturer and the party specifying prepiped units.

"Example B is of course the instant case. The sole difference between A and B is that in the instant case, B, Hudik is an effective means or instrumentality for exerting the economic pressure of the Union against Slant/Fin, the manufacturer, and Austin, the engineer. In Example A Hudik was an ineffective means or instrumentality against the manufacturer and the engineer. The reason for the difference between being an effective or ineffective instrumentality for pressure in the

adjudicative practice, he considered "all the surrounding circumstances." [9]

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two examples is revealed by considering all the surounding circumstances. In the instant case, the matter occurs in New York City, where the construction site is in an area where there are no nonunion steamfitters available or no nonunion mechanical contractors; or, if either of the nonunion categories exist, neither Austin, the union general contractor and engineer, nor Hudik, the union subcontractor could or would see them. That is the reason why the union steamfitters, employees of Hudik, by refusing to install Slant/Fin [units] specified by Austin, are able to use Hudik as an effective means or instrumentality for exerting pressure against Slant/Fin and Austin. The true 'culprits' and the parties with whom the Union has its dispute are Slant/Fin, who manufactures prepiped units, and Austin, who specified such units as the heating and cooling units for installation in the Norwegian Home. If prepaid units cannot be installed in the large commercial, public, and industrial buildings in the New York area or in other areas effectively organized by the Union and other building trades union, the manufacture[r] will be materially affected and Austin and other engineers and general contractors will not specify their purpose and use in buildings.

"But the fact that in Example A, above, Hudik would be an ineffective means of pressure by the Union against Slant/Fin and Austin, and, in Example B, the instant case, Hudik is an effective means of pressure in view of all the surrounding circumstances, does not alter the fact that in both situations, Hudik is a means or instrumentality and that the Union's primary dispute is with Slant/Fin and Austin." [Footnotes omitted.]

J.A. 238-40.

[9] 386 U.S. at 644. *See Generally* Part II of this opinion.

C. *The Board's Decision*

Both the Union and the General Counsel filed exceptions to the ALJ's decision with the Board. Upon review of these submissions, the Board decided

> to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith, and to adopt his recommended Order.

(J.A. 252).

Although the Board essentially adopted the findings and reasoning of the ALJ, its opinion highlighted the facts that (1) the refusal to work was based on a "valid work preservation" contract with Hudik, (2) Hudik was incapable of assigning the work because the questioned work was never Hudik's to assign in the first place, and (3) the Union had immediately and specifically informed Austin, the general contractor, who did not have a contract with or employ any members of the Union, that it would not permit Hudik to install the air-conditioning units. This latter fact indicates that Austin was an object of the Union's complaint from the very start. The Union knew that Austin as the general contractor was the only party with the power to comply with it demand. Thus, relying on the opinion of the ALJ and its own additional statement, the Board found that the Union was exerting prohibited secondary pressure on Hudik with the object either of forcing a change in Austin's manner of doing business or of forcing Hudik to terminate its subcontract with Austin. The Board concluded that the Union's exertion

of pressure on Hudik contravened section 8(b)(4)(B) because it was undertaken for its effect on Austin and Slant/Fin.[10]

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[10] The Board's opinion stated, *inter alia*:

> We agree with the Administrative Law Judge that the Respondent thereby violated Section 8(b)(4)(i) and (ii)(B) of the Act. We note that the refusal of the Respondent to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, the subcontractor, and was for the purpose of preserving work they had traditionally performed. However, Hudik was incapable of assigning its employees this work; such work was never Hudik's to assign in the first place. Moreover, we note that the Respondent informed Austin, who did not employ employees represented by the Respondent and had no agreement with that Union, that it would not let Hudik install the climate control units involved. Considered together, these facts clearly indicate that the Respondent was exerting prohibited pressure on Hudik with an object of either forcing a change in Austin's manner of doing business or forcing Hudik to terminate its subcontract with Austin. Since the pressure exerted by the Respondent on Hudik was undertaken for its effect on other neutral employers, this pressure was secondary and prohibited by Section 8(b)(4)(B).
>
> Accordingly, we find that by its conduct the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act. [Footnote omitted].

J.A. 254. In a footnote the Board further stated:

> In view of our finding that Respondent's actions were undertaken for a secondary objective, we find it unnecessary to pass upon the Administrative Law Judge's finding that Austin and Slant/Fin were the primary employers. Hence, we are not deciding herein whether picketing or other actions brought to bear directly against Austin and Slant/Fin would constitute lawful primary activity.

J.A. 254.

D. *The* National Woodwork *Precedent*

It is apparent that the literal provisions of the secondary boycott statute were violated: the Union did as "a labor organization . . . induce [and] encourage . . . individual[s] employed by a person engaged . . . in an industry affecting commerce to engage in, a strike [and] . . . refusal in the course of [their] employment to use . . . *or otherwise handle or work on* . . . goods, articles . . . where . . . an object thereof . . . [was]—(B) forcing . . . [and] requiring . . . [a] person to cease *using* . . . handling . . . or otherwise dealing in the products of any other person . . . ." 29 U.S.C. § 158 (b) (4) (B). Translating the statute to the facts of this case:

> The Union induced and encouraged its steamfitters employed by Hudik to strike and refuse to use, handle and work on air-conditioning units with internal prepiping where an object of their strike and refusal was forcing and requiring Hudik to cease using the products of Slant/Fin and to cause Austin to cease doing business with Slant/Fin.

We are told by *National Woodwork*, however, that it is not sufficient to find a violation of "the letter of the statute" and that in determining whether certain action is "within the intention of the makers [of the statute]," we should interpret the Act according to "its spirit." [11] 386 U.S. at 619. This is always a

[11] The spirit of the Act is to be found in a combination of (1) the statutory language, (2) the committee proceedings and reports, and (3) the congressional debates. There is no

sound rule of statutory interpretation, but it does not permit wholesale deviation from the provisions of the statute. In any case involving the interpretation of a legislative act the provisions of the statute itself are of primary importance, and the fact that certain conduct is within the literal language of the Act is a weighty and often controlling factor in its interpretation. When we try to overcome the literal applicability of section 8(b)(4) to the facts of this case we have a pretty riddle.

To solve it we start with a factual situation which presents a secondary boycott as proscribed by the literal language of the Act. The question then arises whether the spirit of that law is violated by the acts of the Union in this instance.

The majority points to *National Woodwork* for the principle that "[t]he touchstone is whether the agree-

question about the statutory language—it clearly prohibits product boycotts directed to interference in handling or working on articles such as we have here, where the Union seeks to accomplish its objective through secondary pressures. As for the congressional proceedings, *National Woodwork* notes, 386 U.S. at 624 and nn. 12, 13, that Senator Taft and others "frequently [stated] . . . that § 8(b)(4)(A) was designed to eliminate the 'secondary boycott.'" The Senate Committee Report reiterated this intent. S. REP. No. 105, 80th Cong., 1st Sess. 22, 1 Legislative History of the Labor-Management Relations Act, 1947 (hereafter 1947 Leg. Hist.), 428; 386 U.S. at 625. A strong indication that Congress intended the prohibition against secondary boycotts to be *strictly applied* also is reflected in the extract from the Supplementary Analysis of the bill inserted into the Congressional Record by Senator Taft on June 12, 1947, following the adoption on June 6th of the Conference Report. *See* note 81 *infra*.

ment *or its maintenance* is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at 644-45 (emphasis added). In that case both "the agreement" and "its maintenance" were addressed to the immediate contracting employer. However, while the written agreement here may have been addressed to the contracting employer (Hudik), at least in part, the Union addressed the boycott endeavoring to *maintain* the agreement to employers elsewhere, *i.e.*, to Austin and Slant/Fin. As I read *National Woodwork* it is not sufficient that the agreement have a primary focus, if its enforcement is attempted by secondary pressures.

Judge Wright's opinion seeks its principal support in the decision in *National Woodwork*, but the Supreme Court noted that that case involved a *primary* boycott, a fact which clearly distinguishes it from this case. There the general contractor had agreed with the local carpenters' union that carpenters he employed would not handle premachined doors. This building contract gave him *discretion* to use premachined *or* blank doors, yet he ordered premachined doors from the National Woodwork Manufacturers Association. He was promptly struck by his union carpenters. On these facts the Supreme Court, in the case which resulted from the petition of the Association, held that when employees strike their imediate employer to secure compliance with demands for legitimate work preservation, the boycott is primary and thus not prohibited by section 8(b)(4)(B).

While the opinion in *National Woodwork* recognizes that the object of the strike was the preservation of traditional work it does not hold that all attempts to preserve traditional work by striking one's immediate employer constitute permissible primary boycotts. In fact, the opinion states exactly the contrary:

> In effect Congress, in enacting § 8(b)(4)(A) [now § 8(b)(4)(B)] of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co., supra,* and barred as a secondary boycott union activity directed against a neutral employer, *including the immediate employer* [emphasis added] when in fact the activity directed against him was carried on for its effect elsewhere.

386 U.S. at 632. That is the situation we confront here. Hudik is essentially neutral in this dispute because it does not have and never did have the power to comply with the Steamfitters' demands. Thus the pressure created by the Hudik employees' boycott of the Slant/Fin units must have been directed at Austin and Slant/Fin as they were the only parties with the power to satisfy the demand that the work be taken from Slant/Fin employees and reassigned to the Union. We should not assume an absurdity and conclude that the Union would expect its demands to be met by an employer who did not possess the power to do so. The logical deduction that Austin and Slant/Fin are the objects of the Union's action is as sound a basis for invoking the prohibition of section 8(b)(4) as would be specific proof that the Union was motivated by disapproval of the labor

policies of those parties. The *National Woodwork* Court noted that "[t]here need not be an actual dispute with the boycotted employer [here Austin and Slant/Fin] . . . for the activity to fall within this category [boycotts "tactically calculated to satisfy union objectives elsewhere'], so long as the tactical object of the agreement and its maintenance is that employer . . . thus making the . . . boycott secondary in its aim." 386 U.S. at 645.

E. *Traditional Work*

The Union contends, and Judge Wright's opinion concludes, that the strike against Hudik is primary because the strikers are employed by Hudik, because they are striking Hudik, and because they claim that their sole objective is to enforce Hudik's agreement to assign them their traditional work. Because they are striking their immediate employer to enforce a provision of their contract with him, this argument has a surface plausibility. But this superficial analysis of obvious facts does not necessarily lead to the conclusion that the Union's refusal to work on the Slant/Fin air conditioning units was a primary boycott of Hudik.

As Representative Griffin pointed out during the debate on the Landrum-Griffin Bill, "[w]e must look to the purpose of the picketing in this particular situation." [12] The Kennedy-Thompson analysis of the Landrum-Griffin Bill also identifies the basic flaw in the above reasoning of the majority. It clearly points out the distinction between permitted primary and illegal secondary activity where employees are striking their own employer over wages, *i.e.*, "[When the picket line at the employees' job site] . . . aims at halting commercial intercourse with [their own employer, it is] (a primary boycott) [but when the aim is] at halting intercourse with persons who have intercourse with him [it is] (a secondary boycott)." [13]

[12] II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereafter 1959 Leg. Hist.), 1615.

The Union is seeking what it asserts is *work preservation*, but the means it has chosen toward that end—a strike against an employer who never had the disputed work to assign—constitutes secondary pressure. The boycott's purpose is served primarily by the pressure the Union brings to bear on Austin and Slant/Fin through its strike against Hudik. It is the force and direction of this pressure that determines whether the boycott is primary or secondary. The only parties who could be said to have taken the work away from the local union are Slant/Fin, who manufactured the units complete with internal piping, and Austin, who specified the installation of such completed units. The strike insofar as it is against Hudik is not to achieve work *preservation* because the strike could not *preserve* work that Hudik never possessed and never had the power to assign. [14]

[13] *Id.* at 1707.

[14] A panel of this court composed of Judges Bastian, Burger (now Chief Justice), and Wright held it was a violation of

What the Union is attempting to do by its strike is to compel Hudik to acquire work its members can perform, and this goal is to be accomplished by the secondary pressure that the strike against Hudik brings to bear upon Austin and Slant/Fin: specifically, Hudik can no longer install air-conditioning units necessary for the completion of the building according to contract specifications. Unlike the strike in *National Woodwork*, this action is not a primary boycott against an immediate employer seeking to compel him to exercise discretion over work assignments committed to him by the general contract in a manner compatible with the operative terms of a collective bargaining agreement; instead, this is a secondary boycott against the Union's immediate employer (Hudik) seeking by the pressure such a strike brings to bear on third parties (Austin and Slant/Fin) to cause the immediate employer to *acquire* cer-

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section 8(b)(4)(B) for a union to strike its immediate employer in an attempt to enforce a provision of its collective bargaining agreement which prohibited the employer from contracting for work where plumbing was "withheld from the plumbing contract by either the owner or general contractor for the purpose of being installed by other than journeymen plumbers. . . ." In that case the union contractor (a plumbing subcontractor) had contracted for the inside plumbing and another contractor who employed members of the Laborers' Union had received the contract for the outside utilities. The collective bargaining provision in that case is even clearer and more direct than the work preservation clause here, but nevertheless there was no dispute that the union strike to enforce its provision violated section 8(b)(4)(B). Local 5, Plumbers & Pipefitters v. NLRB, 116 U.S.App.D.C. 100, 321 F.2d 366, *cert. denied*, 375 U.S. 921 (1963).

tain traditional work so he can assign it to his employees.

The determination whether a boycott is secondary involves consideration not only of the objective of the strike in terms of working conditions, but also of the *means* sought to achieve that objective. As the *National Woodwork* Court noted, the "central theme" of section 8(b)(4)(B) is "the protection of neutrals against secondary pressure." 386 U.S. at 612. Thus the statute does not tolerate boycotts involving secondary pressure conducted to preserve traditional work,[15] nor is there anything in its legislative history to support that conclusion. The object, spirit and language of the statute all coalesce in a conclusion that traditional work can be preserved only by a primary boycott and that it is unlawful to use secondary pressure to achieve an otherwise legitimate purpose. Here the pressure on Hudik was secondary and

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[15] In Local 5, *supra*, this court stated:

> The Board correctly counters with the argument that Sand Door [5] disposes of this suggestion. That case teaches us that regardless of the legitimacy of the end sought by the union, it cannot engage in secondary pressure to obtain it. We find nothing in this case which distinguishes it from that rule. Admittedly, clause 32 is not identical to the "hot cargo" provision in Sand Door but that case is not limited to "hot cargo" clauses.

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[5] Local 1976, United Brotherhood of Carpenters' etc., Union v. N.L.R.B., 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed.2d 1186 (1958); see also N.L.R.B. v. Bangor Building Trades Council, 278 F.2d 287 (1st Cir., 1960).

Id. at 104, 321 F.2d at 370.

hence the strike against Hudik is proscribed by the letter and spirit of 8(b)(4)(B).

F. *The Secondary Boycott Conducted by Local No. 3 in New York City*

The majority opinion in *National Woodwork* sought to identify "Congress' purpose in enacting" section 8(e), a provision closely related to and enacted at the same time as section 8(b)(4)(B). The Court indicated that the answer was to be found "from an examination of the congressional action on the subject." 386 U.S. at 620. The opinion proceeded to set out and discuss the extensive statutory history of certain applicable labor legislation. 386 U.S. at 620-24. Next to the language of the statute itself, no better indicia of congressional intent can be found that provided by a close examination of the complete legislative history of the section.

This legislative history begins with the enactment in 1947 of section 8(b)(4)(A),[16] which was part of the Taft-Hartley Act. That Act was drafted and enacted by the 80th Congress over the President's veto following very extensive labor hearings in both the House and Senate. In the course of those hearings there were many references to secondary boycotts.[17] In the House of Representatives, where the legislation originated, the Hartley Bill, H.R. 3020,

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[16] *See* note 2 *supra*.

[17] *See National Woodwork*, 386 U.S. at 633 n.21; *see also* I 1947 Leg. Hist. xliv.

brought secondary boycotts within its definition of "illegal boycott" (Sec. 2(14))[18]. An illegal boycott was within those "unlawful concerted activities" (Sec. 12(a)(3))[19] for which the union and its members were made subject to a suit for damages and to deprivation of their rights under the Act to the same extent as a person found to have engaged in an unfair labor practice (Sec. 12(b) and (d)).[20]

In the Senate the subject matter of section 2(14)(A) and (C) of H.R. 3020, provisions dealing with

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[18] The term "illegal boycott" means a concerted refusal, or threat of concerted refusal, by individuals in the course of their employment—

(A) to render services, where an object of the refusal or threat is to force a person to do business or to cease doing business with another person; or

(B) to render services, where an object of the refusal or threat is to force a person to deal with or to cease dealing with a labor organization as the representative of individuals other than themselves; or

(C) to use, install, handle, transport, or otherwise deal with particular articles, materials, or commodities by reason of the origin or proposed destination thereof, or by reason of the character of a prior or proposed future handling thereof, or by reason of the policies or practices of any person (not their employer) having any direct or indirect relationship thereto.

I 1947 Leg. Hist. 168-69. That the House intended the bill to cover boycotts extending beyond work assignment claims was evident since the bill dealt with such problems as "jurisdictional strikes," which were also prohibited. *Id.* at 169, 205.

[19] *Id.* at 205.

[20] *Id.* at 168, 205.

"illegal boycotts," was placed in section 8(b)(4)(A), which tracked closely the language of the House bill. In the Senate the section assumed its present basic character as a prohibition against an unfair labor practice.[21] But it was the House bill which first attacked union demands upon employers to "cease doing business" with others and refusals "to use, install [or] handle particular articles." The House Committee Report made it clear that in addition to employer-union activities the bill was also aimed at removing "direct restraints of trade."

> Illegal boycotts take many forms. Often they are to compel employers to force their employees into unions or to give a union control over them as their bargaining agent in violation of the Labor Act itself. *Sometimes they are direct restraints of trade, designed to compel people against whom they are engaged in to place their business with some other than those they are dealing with at the time, or vice versa.* The effects of boycotts upon business, and particularly upon small commercial enterprises in metropolitan centers, such as New York, Philadelphia, and Pittsburgh, have often been disastrous.[22]

The sentence in italics identifies an objective of the boycott we are dealing with here.

The House accepted the statutory framework adopted by the Senate and the Senate's redraft of

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[21] *Id.* at 239-40. *Cf.* note 2 *supra.*

[22] I 1947 Leg. Hist. 315 (emphasis added).

section 8(b)(4)(A)[23]; therefore the Senate Report[24] is informative (although not to the exclusion of the House Report) as to the congressional intent of the provision finally enacted.

The statements on the floor of Congress and the committee reports all make some contribution toward clarifying the legislative intent, but no single item of legislative history is any more important to the problem posed by this appeal than the following quotation with respect to section 8(b)(4)(A) from the Senate Report in 1947 on the Senate bill:

> This paragraph [§ 8(b)(4)(A)] also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have *refused to install* electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3. (See testimony of R. S. Edwards, vol. 1, p. 176 et seq; *Allen Bradley Co.* v. *Local Union No. 3, I. B. E. W.*, 325 U.S. 797.)

S. REP. No. 105 on S. 1126, 80th Cong., 1st Sess. 22, 1 Leg. Hist. 428 (emphasis added). While the secondary boycott conducted by Local No. 3 in New York City encompassed manufacturing, distribution, instal-

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[23] *Id.* at 548.

[24] *Id.* at 407-504, see especially p. 428. The "cease doing business with another person" and the "refusal . . . to install [or] handle" provisions were incorporated into the Senate bill almost in *haec verba. Id.* at 7.

lation and repair, it is significant that the Senate Report on the bill chose to mention only the installation aspect. The *National Woodwork* opinion refers to the passage above, but because it quotes only the first sentence the decision does not reveal the very clear intent that Congress indicated by its specific reference to the particular testimony of R.S. Edwards before the Senate committee on Local No. 3's secondary boycott.[25] 386 U.S. at 619-20. The Committee Report also cited the decision in *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945), where the Supreme Court considered the secondary boycott activities of Local No. 3. Neither the reference to Edwards' testimony nor that to *Allen Bradley* indicates that Congress intended section 8(b)(4)(B) to be given so narrow a construction as to exclude the secondary boycott that exists here. Let us then examine the Edwards and *Allen Bradley* references as an aid in ascertaining congressional intent.

G. *Edward's Senate Testimony and the Conspiracy in* Allen Bradley

The secondary boycott conducted in New York City by Local No. 3, IBEW is best described in Edwards' testimony[26] rather than in the opinion in *Allen Bradley*,[27] since Edwards' testimony was directed

[25] The Edwards testimony was selected from over 2400 pages of Senate hearings.

[26] 1 Senate Hearings on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess. 176-204 (1947).

[27] *But see* Justice Roberts' concurring opinion. 325 U.S. at 813-20.

to the labor law aspects of Local No. 3's activities, while the opinion in *Allen Bradley* related primarily to antitrust issues. In fact the Supreme Court decided that under the law as it existed prior to outlawing secondary boycotts, the union's conduct would have been valid if it had acted alone and not conspired with employers. Edwards testified that Local No. 3 was involved in a monopoly in New York City of the "complete manufacture, distribution, installation and maintenance of all electrical-construction materials."[28] Local No. 3 was for all practical purposes the only electrical "installation" union in New York City.[29] It was the *installation* restrictions as enforced by the conspiracy, prohibiting local electricians in New York City from doing any work on electrical fixtures and other electrial materials *after* their manufacture, to which the product boycott prohibitions of section 8(b)(4)(A) of the Labor Act were particularly directed. The Department of Labor had received a number of complaints that Local No. 3 was "declining to install electrical equipment unless it bears the label of that organization [*i.e.*, Local No. 3]."[30] "Even materials manufactured by other IBEW locals outside the Greater New York district are black listed."[31] Prior

[28] *See* note 16 *supra*. This testimony was corroborated by the decision in *Allen Bradley*, 325 U.S. 797 (1945).

[29] 1 Senate Hearings on S. 55; S.J. Res. 22, 80th Cong., 1st Sess. 181 (1947).

[30] *Id.* at 187.

[31] *Id.* at 183.

to passage of section 8(b)(4)(A) the boycott imposed by Local No. 3 was successful in requiring that electrical fixtures or installations manufactured elsewhere be "dismantled and the wire taken out of them, and then" rewired on the job by the local union before they could be installed in New York City.[32]

Thus, in its essential features, and particularly as it related to *installation abuses*, the boycott by Electricians Local No. 3 in New York City described in Edwards' testimony was very close to that which the Steamfitters' Union here brought against Hudik. Both unions refused to install manufactured articles to protect the on-site job work of their union members, and the only way their demands could be met was to allow the manufactured articles to be dismantled on site and permit the members of the local union to redo the work already done by the manufacturer, and for the future, for the employer having charge of the installation to cease doing business with the manufacturer unless it changed its manufactured articles to permit on-site workers to do some of the final assembly work. The result in the case of Local No. 3 would be the delivery to the installers of incomplete fixtures without internal wiring (or dismantling and rewiring) and with Local No. 638 (the Steamfitters) it would be the delivery of incomplete air-conditioning units without internal piping (or dismantling and repiping).

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[32] *Id.* at 188.

The Senate Report clearly indicated that the "will not handle or work on" provisions of section 8(b)(4)(A) were aimed at precisely the type of secondary boycott that exists here.[33] And since, as *National Woodwork* states, "the basic thrust of [section 8(b)(4)(A)] was not expanded by the Landrum-Griffin [1959] amendments,"[34] the same interpretation is to be given to the present section 8(b)(4)(B). The addition in 1959 of the specific proviso protecting primary boycotts that were not "otherwise unlawful"[35] did not change the intent of the section. What

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[33] S. REP. No. 105, 80th Cong., 1st Sess. 22, I 1947 Leg. Hist. 428.

[34] 386 U.S. at 623-24.

[35] It is settled law that the National Labor Relations Act does not require any employee to cross a primary picket line (*NLRB* v. *International Rice Milling Company*, 341 US 665). The language of the "hot cargo" ban in S. 1555—which your committee adopted—did not impinge in any way on existing law concerning the crossing, or not crossing, of primary picket lines by employees. However, in order to set at rest false apprehensions on this score, the committee appended the disclaimer proviso which appears in section 705(a)(2) of the bill.

H. REP. No. 741, 86th Cong., 1st Sess. 80, I 1959 Leg. Hist. 838.

> The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations of picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB* v. *Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); *Brotherhood of Painters, Decorators, and*

the proviso did was merely make explicit that which was previously implicit. The statement that Congress intended to make secondary boycotts illegal [36] clearly implies that primary boycotts are legal.

H. *The Majority Opinion and Right to Control*

Faced with the fact that the letter of the statute is clearly violated and that the ALJ and the NLRB after considering all the surrounding circumstances found a secondary boycott in violation of the Act, the majority opinion launches into an attack on the so-called right-to-control test, which it asserts the Board used as the *sole* basis for its decision. In this respect the majority opinion is in error. The ALJ clearly considered all the "surrounding circumstances" [37] and the Board affirmed his "rulings, finding and conclusions" (J.A. 252) insofar as they were consistent with its decision and adopted his recommended Order. Since the opinion of the ALJ was consistent in almost every respect with the Board's decision, the Board indicated that it relied on all the surrounding circumstances of the boycott to the same extent as the ALJ. Thus the basic attack of the ma-

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Paper Hangers, etc., and *Pittsburgh Plate Glass Co.*, (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRB 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953)).

H. CONF. REP. No. 1147, 86th Cong., 1st Sess. 38, I 1959 Leg. Hist. 942.

[36] I 1947 Leg. Hist. 428.

[37] *See especially* note 6 *supra*.

jority opinion, the claim that the Board based its decision only on the right-to-control test and failed to take into consideration all the surrounding circumstances, has no foundation in fact.

Moreover, after devoting most of its opinion to an attack on the concept of right to control as a complete test to determine whether a boycott is primary or secondary, the majority in its closing paragraph finally comes to reality and admits that control over disputed work does have a vital place in determining the essential issues:

> However, in remanding in *Local 742*,[38] *supra*, and *Local 636*,[39] *supra*, we held that legal control in the struck employer over assignment of the work which a union professes a desire to preserve, while not alone dispositive, *may be considered by the Board along with other factors* [emphasis added] suggested by the *National Woodwork* Court in determining the union's actual objective.

Majority Op. at 30-31. That is precisely the manner in which the ALJ and the Board did weigh and evaluate the demand of the Union and Hudik's inability to meet the work assignment demands of the union.

It must also be noted that since right to control is recognized as a part of the test to be applied in such cases, instances may well arise where the out-

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[38] Local 742, Carpenters v. NLRB, 144 U.S.App.D.C. 20, 444 F.2d 895, *cert. denied*, 404 U.S. 986 (1971).

[39] Local 636, Plumbers & Pipefitters v. NLRB, 139 U.S.App. D.C. 165, 430 F.2d 906 (1970).

come of its application will prove to be the *decisive* factor. In passing the original secondary boycott restriction, the House of Representative forecast the use of a right-to-control test when it indicated that it intended to proscribe those boycotts where "the employers are powerless to comply with the demands giving rise to the [boycotting] activities . . . ." H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947), I 1947 Leg. His. 314.

This comment recognizes the force and validity of a right-to-control test and the unfairness of permitting a strike against an employer who lacks the right to control the decision. Even where right to control is not decisive, in almost any case it will be a factor entitled to very substantial weight because it measures the ability of the employer to comply with the union demands. Law and logic compel the conclusion that the ability or inability of two individuals to comply with a demand is a very material factor in determining whether one or the other is the true object of the demand.

II. THE RIGHT-TO-CONTROL TEST

By 1967 seven Circuit Courts of Appeals had reviewed the right-to-control test: each circuit had validated the test without dissent.[40] In that year the

[40] *See* Local 5, Plumbers & Pipefitters v. NLRB, 116 U.S. App.D.C. 100, 103, 321 F.2d 366, 369, *cert. denied*, 375 U.S. 921 (1963); Local 636, Plumbers & Pipefitters v. NLRB, 108 U.S.App.D.C. 24, 30, 278 F.2d 858, 864 (1960); NLRB v. Enterprise Association, Local 638, Plumbers & Pipefitters, 285 F.

Supreme Court in *National Woodwork* articulated the standards by which primary and secondary activity should be distinguished. The Court upheld the Board's determination that the particular work preservation clause at issue was not violative of section 8(e) of the Act[41] and that enforcement of the provision against a primary employer did not contravene section 8(b)(4)(B), but specifically withheld judgment on the propriety of the right-to-control test upon which the Board's conclusions in that case were founded.[42] Yet several circuits thereafter reversed their prior decisions sanctioning the test, based upon language

2d 642, 645 (2d Cir. 1960); NLRB v. Local 1694, Longshoremen, 331 F.2d 712, 716-17 (3d Cir. 1964), *aff'g* 137 NLRB 1178; Ohio Valley Carpenters District Council v. NLRB, 339 F.2d 142, 145 (6th Cir. 1964); American Boiler Mfrs. Ass'n v. NLRB, 366 F.2d 815, 882 (8th Cir. 1966).

[41] 29 U.S.C. § 158(e) (1970) provides:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . ."

[42] 386 U.S. at 616 n.3.

in *National Woodwork* which supposedly disapproved exclusive use of the test by the Board.[43]

On two occasions this court has announced similar decisions.[44] The majority now insists once more that the theoretical underpinnings of the right-to-control test were completely destroyed by *National Woodwork*. I am more inclined to accept at face value the Court's statement that the test was not under consideration in that case. I thus dispute the basic premises of the majority's opinion, and conclude that the reasoning of *National Woodwork* is compatible with the use of the right-to-control test to the extent that it was used in this case.

A. *The Surrounding Circumstances*

The majority admonishes the Board to scrutinize the "realities" of the Union's dispute with Hudik-Ross, and insists that the single-minded right-to-control formula is devoid of practicality as well as theoretically bankrupt. A closer look at the findings and con-

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[43] *See* NLRB v. Local 164, IBEW, 338 F.2d 105, 107-10 (3d Cir. 1968); American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 556, 561 (8th Cir. 1968); Western Monolithics Concrete Prods., Inc. v. NLRB, 446 F.2d 522, 526 (9th Cir. 1971); Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188, 192 n.10 (1st Cir. 1969) (dictum). *Contra*, George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973); *cf.* Associated General Contractors of California v. NLRB, —— F.2d —— (9th Cir., filed Mar. 28, 1975).

[44] Local 742, Carpenters v. NLRB, 144 U.S.App.D.C. 20, 444 F.2d 895, *cert. denied*, 404 U.S. 986 (1971); Local 636, Plumbers & Pipefitters v. NLRB, 139 U.S.App.D.C. 165, 430 F.2d 906 (1970). My concurrence in those decisions was based on the use of the right-to-control test as an *exclusive* and *per se* standard.

clusions of the Administrative Law Judge (ALJ) which the Board adopted [45] reveals that the test, as it was applied to the facts of this controversy, furnished a distinctively realistic basis for interpreting the relative positions of Enterprise and Hudik-Ross and a thoroughly practical determination of the objects of the Union's economic action.

1. *The Contractual Framework*

The ALJ determined that Austin was both general contractor and engineer for construction of the Norwegian Home for the Aged. Significantly, "Austin prepared the engineering job specifications for the Norwegian Home." [46] By the time Austin subcontracted the heating, ventilating and air-conditioning work on the project to Hudik-Ross, it had contracted for the purchase of prepiped Slant/Fin climate control units.

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[45] *See* text at 7-11 and note 8 *supra*.

[46] J.A. 233. These facts parallel the situation in *National Woodwork*. There Frouge, the general contractor for the Naval Capehart Housing Project, exercised dominion over relevant specifications. The significant difference between the cases is evidenced in the ALJ's conclusion that:

> The Government's specifications for this job with reference to the type of doors required set forth the standards to be followed. However, neither the specifications nor Frouge's contract with the Navy required the doors to be precut or prefitted or premachined.

149 NLRB 646, 652.

In his conclusions of fact, the ALJ advanced an interpretation of the work preservation agreement between Hudik and Enterprise.

> [I]n my opinion, the instant contract between Hudik and the Union, in providing that pipe would be cut and threaded on the job, necessarily implied that it referred to pipe within Hudik's control and which could be cut on the job. Neither Hudik nor the Union in their contract could prescribe nor were they prescribing the treatment of pipe that was within or had been within the control of some other party . . . .[47]

The ALJ buttressed his interpretation of the work preservation agreement with a practical analysis of the benefit the Union hoped to derive from the provision.

> [W]e might presume that the Union would have been happy and content if Hudik had never sought or received the Norwegian Home contract or if Hudik would breach his subcontract as soon as the Union reminded Hudik of Rule IX of the Union contract. But, if Hudik, an employer of union steamfitters, does not bid on jobs and does not secure subcontracts, how does such a

[47] J.A. 237. The ALJ carefully contrasted this situation with the one which obtained in *National Woodwork*, noting (1) that Frouge "had the choice of using non-premachined or premachined doors, and chose the latter," and (2) that the union in *National Woodwork* insisted it would not handle premachined doors. In pointing out that the latter distinction, though "real," was not a "major basis" of his decision, the ALJ signalled that the former distinction was in fact significant.

> situation preserve or increase work for Hudik's union steamfitters . . . .[48]

Implicit in this observation is a reality to which the majority gives lip service but which it fails to apprehend: Hudik could not decline to bid on projects with prefabrication specifications and continue to be a competitive subcontractor.

Regardless of the validity of the ALJ's construction of Rule IX of the collective bargaining agreement, his tacit observation that trade unions' work preservation agreements almost inevitably conflict with contractual design specifications evinces a practical understanding of the true nature of the dispute between Hudik and Enterprise. Underlying his decision is the determination that the fundamental responsibility for prefabrication specifications in the construction industry falls on architects, engineers, and general contractors, and that boycotts by craft unions against subcontractors necessarily have as a primary object the application of pressure to those third parties who actually require the use of factory-prepared products.[49] A recital of the surrounding circumstances that the ALJ examined to arrive at this conclusion demonstrates that he was concerned less with the locus of legal or contractual hegemony over disputed work than with the source of practical or effective control over prefabrication specifications.

[48] J.A. 240.

[49] *See generally id.* at 237, 238.

2. *The Labor Situation in New York*

In analyzing the dispute between Enterprise and Hudik, the ALJ gave particular emphasis to three distinct points. First, Austin, in its capacity as "engineer and general contractor for the entire job, had made an engineering and business judgment that the Slant/Fin units were to be used on the project. . . ." [50] The ALJ noted Austin's awareness that "these units were factory prepiped, tested, and guaranteed by the manufacturer," [51] apparently to suggest the factors that prompted the use of prefabricated climate control units. In discussing analogous contractual predicaments, both hypothetical and real, he pointedly identified the parties who controlled the specification of prefabricated products: in each case, an architect, engineer, or general contractor. His drift was unmistakable: pressure for the modification of prefabrication policies must focus on these principals or on the manufacturers of prefabricated goods.

Second, the ALJ identified the means by which pressure could be brought to bear on these responsible parties. He drew a distinction between "effective" and "ineffective" "means or instrumentalit[ies] . . . for exerting pressure against the manufacturer of prepiped units or the engineer specifying their use." [52] In a thoroughly unionized setting, subcontractors could influence project specifications by declining to

[50] *Id.* at 236.

[51] *Id.*

[52] *Id.* at 238; *see also* note 8 *supra*.

bid on projects which denied their employees the right to perform traditional unit work. The threat or enforcement of a boycott by those employees or unions representing them would deter subcontractors from bidding on projects with such specifications, and thus similarly discourage the use of prefabricated goods. But in a nonunionized area subcontractors would clearly be ineffective instrumentalities for exerting these pressures: the sole consequence of their actions would be the hiring of nonunion labor to install prepiped units. In obeisance to *National Woodwork*, the ALJ noted that the distinction was meaningful only in the context of "all the surrounding circumstances" —evidently, it was drawn to shed light on the practical purpose of work preservation boycotts.[53] He con-

[53] The significance of the distinction between "effective" and "ineffective" means of exerting pressure escapes the majority, which can only conclude that it is "absolutely *irrelevant*" to the issue of Hudik's neutrality. Majority Op. at 7 n.9. But it is inaccurate to ascribe this view to the ALJ. He drew the dichotomy to demonstrate in bold relief the purpose of the Union's action, the bringing to bear of pressure on those parties who specified the use of prefabricated products, and thus to highlight Hudik's incidental role in the controversy. The statute requires proof that *an object* of an economic action be proved to be secondary, and so the ALJ turned to the most important single "surrounding circumstance," the balance of power in the New York construction industry, to find an absence of nonunion labor in that area, bolstering his belief that the Union's purpose was to influence the policies of Austin and Slant/Fin. A contrary finding that ample nonunion replacement labor rendered Hudik an ineffective means or instrumentality for pressuring parties to the Norwegian Home contract would have undermined his theory, for the motive and expectation he imputed to the

cluded after his analysis of all the relevant facts that "Hudik [was] only a means or instrumentality for exerting pressure against Slant/Fin and Austin with whom the Union has its primary dispute . . . ." [54]

Third, the ALJ examined the circumstance most relevant to the instant case: the dearth of nonunion labor in New York City, site of the Norwegian project.[55]

Union would in that case have been unreasonable. His announcement that "in both situations" Hudik was just a "means or instrumentality" signalled that in either event Hudik was not the object of the Union's action, while the effective/ineffective distinction went to the validity of the conclusion that Austin and Slant/Fin were in fact such objects.

I sympathize with the majority's hesitancy concerning the use of the word "neutral," and concede that Hudik is not neutral in the sense that it is uninvolved with, or unaffected by, the instant dispute. The source of Hudik's legal neutrality is the fact that the Union in these circumstances cannot *rationally* boycott Hudik to secure the right to perform internal piping on the heating and cooling units, without intending to pressure Austin and Slant/Fin, since only Austin and Slant/Fin are capable of acceding to the Union's demands. Thus Hudik is neutral with respect to the particular remedy of economic action which the Union invoked to redress its grievances. This line of reasoning does not confuse "objects" and "effects" of economic actions, as the majority fears, *see* Majority Op. at 29 n.36. Where secondary consequences are essential to the success of a strike, and are in fact the reason for its existence, the strike has a secondary object. *Cf.* note 78 *infra*.

[54] J.A. 238.

[55] This aspect of the ALJ's findings is an effective response to the argument that the Board may not generalize concerning the relative bargaining positions of sub- and general con-

> [I]t is an appropriate subject of official notice that in New York City and probably in all or most of the major cities in this country, the building and construction industry is unionized, certainly with respect to major industrial, commercial, and public construction.[56]

The ALJ asserted that the Norwegian Home was "in an area where there are no nonunion steamfitters available or no nonunion mechanical contractors; or, if either of the nonunion categories exist, neither Austin, the union general contractor and engineer, nor Hudik, the union subcontractor could or would see them." [57] Thus Hudik was an effective instrumentality for pressuring the "true 'culprits,' and the parties with whom the Union has its dispute[:]

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tractors, but must consider the surrounding circumstances of each individual labor dispute. While the ALJ relies—and must rely—in part on experience in assessing the ability of Hudik to influence Austin's prefabrication specifications, he examines the factors which might rebut his presumption that subcontractors cannot directly influence the decision of an engineer or general contractor to use prefabricated products. Contrary to the majority's insistence that it is virtually impossible to prove the absence of an imputed secondary objective, Majority Op. at 7 n.9, the Board's review of circumstances determining the degree of a subcontractor's control may indicate an unequivocally primary purpose. Here, if unions did not control the labor supply in the New York construction industry, J.A. 239 n.10, or if Hudik were deemed an ineffective instrumentality of pressure on Austin, the analysis by the ALJ might well have yielded a contrary conclusion.

[56] J.A. 239.

[57] *Id.*

Slant/Fin, who manufacturers prepiped units, and Austin, who specified such units as the heating and cooling units for installation in the Norwegian Home." [58] Alternative union labor would not be available, for " in the construction industry it is the unions that control the labor supply and if the union steamfitter employees of Hudik on the Norwegian job refuse to work, other steamfitters will not be available to Hudik or to anyone else to perform work on the job." [59] The consequence of a Hudik boycott was clear:

> If prepaid [prepiped] units cannot be installed in the large commercial, public, and industrial buildings in the New York area or in other areas effectively organized by the Union and other building trades unions, the manufacture[r] will be materially affected and Austin and other engineers and general contractors will not specify their purchase and use in buildings.[60]

Finally, the ALJ fit these factual parameters into a legal equation of section 8(b)(4)(B) and concluded that the Union's dispute was not with the actions of Hudik, but rather with the labor policies that Austin enforced through its specifications and with the products distributed by Slant/Fin. Because Hudik was accorded a secondary role in the conflict, the boycott by the Union violated the Act's prohibi-

[58] *Id.*

[59] *Id.* n.10.

[60] *Id.*

tion of economic action directed toward neutral employers.

3. *The Order of the Board*

The Labor Board affirmed "the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent" with its own brief Decision and Order and adopted his recommendation that the Union be ordered to discontinue its boycott of Hudik. The Board's principal exception to the ALJ's findings was its refusal to rule, as he had, that economic actions directed against Austin and Slant/Fin would constitute lawful primary activity. It nevertheless concurred in his determination of Hudik's neutrality. To reinforce his conclusion that Austin was the true object of the boycott, the Board noted that

> the Respondent informed Austin, who did not employ employees represented by the Respondent and had no agreement with that Union, that it would not let Hudik install the climate control units involved.[61]

The Board also articulated a point that was implicit in the findings of the ALJ, that the ultimate purpose of the Union's action was the preservation of work its member employees had traditionally performed. But the means adopted by the Union to achieve this goal offended the Act's proscription of secondary boycotts. "Since the pressure exerted by the Respondent on Hudik was undertaken for its

[61] *Id.* at 254.

effect on other neutral employers, this pressure was secondary and prohibited by Section 8(b)(4)(B)." [62]

B. *The Significance of "Control"*

The unrealistic, unidimensional *per se* control test the majority discredits is a straw man. The Board does not employ a *per se* formulation, which might well violate the structure of *National Woodwork* that the focus of a union's action must be determined from all the surrounding circumstances; instead, the Board relies on a *prima facie* standard. By this test, a union may not boycott an employer who lacks the right to control the assignment of disputed work, *provided* that the employer has not voluntarily relinquished that control.[63] The redeeming feature of this criterion is that it permits and even mandates the conclusion that the union acted properly in launching an economic action whenever "the employer's loss of power to assign the work is the result of his own efforts to instigate the subcontracting to another of work subject to his work preservation agreement with the union" [64]—in the majority's parlance, whenever he "binds his own hands." In such a case the employer would cease to be neutral, and would be termed "offending" by virtue of his voluntary action surrendering legal control of the disputed work.

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[62] *Id.*

[63] Brief for the NLRB at 5 n.4; *see also* Painters District Council No. 20, 185 NLRB 930, 932 (1970); Local 120, Plumbers & Pipefitters, 168 NLRB 991, 992 (1967).

[64] *Id.*

The situation which the Board contemplates would shift responsibility for the dispute to the employer is precisely that of *National Woodwork*. Discretion in the specification of prefitted doors rests with Frouge, the general contractor.[65] His unilateral decision to use premachined rather than "blank" doors prompted the Union's boycott. By contrast, here the specification of prepiped climate control units was fixed by a provision of the contract on which Hudik bid.

That the factual differences between *National Woodwork* and this case are sufficient to justify the legal distinction the Board urges is suggested by the ALJ's conclusion that Hudik's alternatives were either to bid on the Norwegian Home contract in spite of the contractual conflict or to have insufficient work for its employees.[66] The Board had expert

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[65] *See* notes 46 & 47 *supra*.

[66] The majority argues that "for all relevant analytical purposes, the situation of the . . . employers [in this case and in *National Woodwork*] is identical." Majority Op. at 19 n.25. One of the parallels drawn to support this contention is the claim that in both cases "the employer could comply with the union's demands *before* breaking the contract." *Id.* We deem it a relevant analytical distinction that in *National Woodwork*, Frouge, the general contractor and the target of the strike at issue, was able to comply with the union's demands and simultaneously continue work on the project, while Hudik could comply only by declining to bid for Austin's subcontract or for that of any other general contractor intent on utilizing prefabricated goods.

The realism of this approach lies in its recognition that an employer who simply bids on a contract with specifications which conflict with his own work preservation agreement is not truly "offending": the economics and practicalities of his

knowledge of the competing forces within the construction industry—perhaps the exclusive domain of the complex and contradictory subcontracting practices we consider here.[67] The wiser course is to recognize and respect the distinction the Board observes between "offending" employers—most commonly, engineers and general contractors—who actively and by choice assign traditional unit work in derogation of work preservation agreements, and "unoffending" subcontractors who enter into contracts with prefabrication specifications rather than pursue the economically disastrous course of declining to bid on such contracts.[68]

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occupation leave him little choice. In these circumstances he is a neutral caught between the union on one side and the general contractor and manufacturer on the other.

The majority suggests as another alternative that Hudik and other subcontractors similarly situated should by prior arrangement offer their employees compensation for traditional work which cannot be performed at jobsite. The short answer to this proposal is that it is not necessary: if the work preservation agreement at issue is construed to reserve to the union all traditional work and not simply that over which the employer has control, then a contractual right to damages enforceable by lawsuit may have accrued to the union. Adjustment by prior arrangement is a desirable solution, but where by ignorance or design an employer enters a contract which denies him the right to preserve traditional work for his employees, judicial enforcement is an established remedy clearly preferable to economic action which violates § 8(b)(4).

[67] The Board treats the right-to-control test as a standard applicable to the construction industry, and none of the parties cites a case in which the test was applied in a different context.

[68] *Compare* Local 636, United Association, and Mechanical Contractors of Detroit, 177 NLRB 189, 190 (1969) *with*

The legal consequence of this distinction is the classification of subcontractors like Hudik who enter contracts with specifications contrary to their work preservation agreements as neutral employers. The majority rejects as inherently sophistical the notion that such employers can ever be termed neutral: in their eyes Hudik, for example, has actively violated an understanding for which the Union bargained collectively, and the Union's dispute is clearly with Hudik.[69] But the Labor Board takes a more refined and realistic view of the situation. The Board insists that the Union's true complaint is with the predilection of architects, engineers and general contractors for factory-designed and -assembled goods. The Board need not consider the encroachment of modern technology, the relative advantages and disadvantages of prefabricated products, or the economic arguments which the *National Woodwork* Court ignored[70]; it simply recognizes as one factor influenc-

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Painters District Council No. 20, 185 NLRB 930, 932 (1970); *and* Local 438, Plumbers and Pipefitters, 201 NLRB 59, *enforced*, George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973) *with* Local 120, Plumbers & Pipefitters, 168 NLRB 991, 992 (1967).

[69] Majority Op. at 17, 25 n.33, 27 n.34, 29. *But see* the statement of the *National Woodwork* Court that Frouge, the immediate employer of the boycotting employees in that case, would become a neutral, in spite of his voluntary violation of a valid work preservation clause, if the boycott were "tactically calculated to satisfy union objectives elsewhere." 386 U.S. at 644-45.

[70] Both Justice Brennan's majority opinion and Justice Harlan's concurring memorandum in *National Woodwork*

ing its decision that the policy of using prefabricated goods, and the power to compel their use, belong to the general contractor and not to the subcontractor.[71]

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cautioned against judicial interpretations of the NLRA strained to comport with personal economic convictions. Justice Brennan volunteered that "economic and technological factors" militating against "will not handle" clauses "in all circumstances" should be considered by Congress, but insisted that "Congress' policy has not yet moved to that point . . . ." 386 U.S. at 644. Mindful of the Court's pronouncement, I do not argue that the law should be tailored to suit protean economic conditions, but only that the structure, customs and economics of a particular trade or industry may help to define the purpose of actions taken by parties to a labor dispute.

[71] The majority ignores a critical point which validates the Board's approach: the Board is looking not only at the locus of legal control over disputed work at the time charges are filed, nor only at the predicament of a particular employer and employee, but instead at the locus of power over design specifications in the construction industry in the New York area. Recognizing that the subcontractors who employ members of traditional craft unions lack meaningful input into decisions concerning project specifications, the Board refuses to penalize them for conflicts beyond their control, but does not hesitate to affix responsibility when they voluntarily reassign work which is subject to work preservation agreements. *See* cases cited at note 68 *supra*. The ALJ's construction of Rule IX of Hudik's collective bargaining agreement with Enterprise to apply only to work which Hudik had discretion to preserve is consonant with this approach. Absent his overview of subcontracting practices in the construction industry, the ALJ could not accurately ascertain an employer's ability to accede to union demands; without this determination, his identification of the focus and purpose of the union's economic action would be more difficult.

To hold that the Board cannot generalize from its examination of particular factual situations, that it cannot adopt a rule based on the structure and custom of construction subcontracting, is to reject the benefits of administrative experi-

Thus the Union's dispute cannot logically be solely with the subcontractor, but must instead be also with the party who dictates that prefabricated products shall be employed: the owner, the designer, the general contractor.

The right-to-control test would clearly be less palatable if "control" signified only immediate legal dominion or contractual power, as the majority suggests.[72] The term includes these factors, but in addi-

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ence and expertise. Like the Supreme Court in *National Woodwork*, we are confronted with voluminous briefs of *amici* submitted to demonstrate that prefabrication specifications are both ubiquitous and essential—economically and functionally—to the construction of modern buildings. While it is intuitively evident that the meticulous requirements of specialized projects may at times compel the use of prefitted, prefabricated or factory-installed equipment, we cannot extrapolate from the data the *amici* submit any legal or factual principle concerning work preservation boycotts. But we may note that the Board's conclusion that general contractors and not subcontractors tend to exercise control over the specification of prefabricated products is not without record support. *See, e.g.*, cases cited at note 68 *supra*. And this conclusion inevitably influences the Board's decision as to whose labor policies a boycotting union is attempting to change. *Cf.* note 55 and accompanying text *supra*.

[72] *See, e.g.*, Majority Op. at 7 n.9. The majority depicts this opinion as a "smorgasbord," which it attempts to separate into three "possible explanations" of the Board's action. Instead what is offered, à la carte, is a solitary thesis: that the ALJ, in conformity with the *National Woodwork* mandate, applied to the circumstances of this dispute a *prima facie* right-to-control test, whereby an illegal secondary objective would be imputed to the Union if an examination of the surrounding circumstances revealed that the boycott was directed at a subcontractor who from the start lacked *legal and practical* control over the assignment of the disputed work.

tion it denotes an employer's ability to effect changes in or exert influence upon the construction policies of those parties who specify the use of prefabricated products.[73] To this end the ALJ scrutinized not just the provisions of Hudik's contracts with Austin and Enterprise, but more importantly Hudik's practical ability to satisfy Rule IX of its collective bargaining agreement by inducing or persuading Austin to allow jobsite piping of climate control units. The ALJ concluded that Hudik, though an effective instrumentality of pressure against Austin and other New York City engineers if it refrained from bidding, could exert little influence on the use of Slant/Fin products if it participated in construction of the Norwegian Home. As a typical craft subcontractor, Hudik lacked effective control over Austin's use of prepiped units.[74]

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[73] Discussing the significance of economic interrelationship between the parties to a construction project, a panel of this court noted that "the factors on which the independent contractor finding rests demonstrate that one party does not exercise control over the other in significant respects." Carpet Layers Local 419 v. NLRB, 151 U.S.App.D.C. 338, 345, 467 F.2d 392, 399 (1972). In that case the inability of one contractor to control another was deemed relevant to the determination of secondary status for the purposes of section 8(b)(4). This broader sense of the term "control" is the usage and intendment of the Board in its right-to-control formulation, rather than the concept of immediate legal control which the majority assails.

[74] The majority in its footnote 25 states that on remand the Board can examine the contractual relations of the parties to determine "not only the situation the pressured employer finds himself in but also how he came to be in that situation." This inquiry is one of the surrounding circumstances the Board is urged to consider in assessing innocence, neutrality, and primary status. The majority fails to recognize that the Board has already made precisely such a judgment, that it has determined, contrary to the views of the majority, that to deny subcontractors like Hudik the right to bid where such conflicts exist does in fact "unduly [tie] an employer's hands concerning managerial discretion." The Board has concluded that the subcontractor's hands are tied long before he bids on a general contract with provisions contrary to his work preservation agreement.

Significantly, if the only impediment to Hudik's ability to preserve work for its employees had been a contractual term, the ALJ's examination of the factual context of the labor dispute and his identification of the parties responsible for prefabrication specifications might nevertheless have led him to conclude that the Union was engaged in a primary boycott. If, for example, Austin's plans allowed Hudik the option of jobsite piping, any attempt to establish a dummy subcontracting scheme to absolve Hudik of responsibility for prefabrication specifications and to immunize it from boycotts would be frustrated at the outset by the Board's analysis. This legal fiction would not negate Hudik's practical ability to accede to its employees' bargaining demands and to meet the requirements of its collective bargaining agreement.

C. *The Object of the Union's Boycott*

I recognize, as have both the majority and the ALJ, that as a class, as an intermediate echelon in the constuction industry, subcontractors like Hudik do exert considerable influence over the use of prefabricated materials in construction projects. In footnote 25 the majority cites the ALJ's conclusion that "[i]f prepaid [*sic*] units cannot be installed * * * Austin and other engineers and general contractors will not

specify their purchase and use in buildings." [75] For the majority this pressure has an apparently salutory consequence: work preservation clauses "subserve the [Union's] legitimate end of ensuring that its members [can] continue to perform in the future the work they [have] traditionally performed in the past." [76] But by acknowledging that those work preservation boycotts against subcontractors have as their primary purpose—indeed, their only logical purpose [77] —the bringing to bear of pressure against engineers and general contractors responsible for prefabrication specifications, the majority undercuts the analytical framework of its opinion. The majority concedes the effective neutrality of subcontractors like Hudik by admitting that the primary goal of work preservation boycotts against subcontractors is the effectuation of a change in design specifications for construction projects.[78]

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[75] J.A. 239.

[76] Majority Op. at 19 n.25.

[77] The majority notes the facial validity of the ALJ's conclusion that Hudik cannot preserve work by failing to bid on jobs and secure contracts, but exp'ains that work preservation clauses are in fact efficacious when enforced in concert, since engineers and general contractors will ultimately be forced to eschew prefabrication specifications in order to secure bids from subcontractors.

[78] A fine distinction may exist between the secondary *objects* which the statute proscribes and secondary *effects* of primary action, which the case law tolerates. *See, e.g.*, NLRB v. Local 825, Operating Engineers, 400 U.S. 297, 304-05 (1971); Steelworkers (Carrier) v. NLRB, 376 U.S. 492, 496 (1964); Electrical Workers (General Electric) v. NLRB, 366 U.S. 667, 682 (1961). Because the ALJ and the majority both recognize

Clearly section 8(b)(4)(B) represents a compromise, an accommodation between the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." [79] The majority would emphasize the Union interest in this balance, but explicit statutory language delimits the union's right to exert economic pressure at that point where *an object* of the action is forcing secondary employers to modify their labor policies and practices. The Supreme Court announced in *Denver Trades* [80] that "[i]t is not necessary to find that the *sole* object of the strike [is] that —of forcing the contractor to terminate the subcontractor's contract." [81] This court has also embraced the view that violation of section 8(b)(4) is established if "*an* objective of the union's secondary action, although *not necessarily the only objective*, is to force the secondary employer to cease doing busi-

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that Enterprise's enforcement of its work preservation agreement against Hudik makes sense only if concomitant pressures are exerted on Austin, I have no difficulty concluding that those pressures are an object and not just an ancillary consequence of the Union's action. *Cf.* Local 636, Plumbers & Pipefitters v. NLRB, 139 U.S.App.D.C. 165, 430 F.2d 906 (1970).

[79] NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 692 (1951); *see also National Woodwork*, 386 U.S. at 626-27; Majority Op. at 16.

[80] NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951).

[81] 341 U.S. at 689 (emphasis in original). Senator Taft, sponsor of the bill which included the original section 8(b)(4),

ness with the primary employer." [82] And the *National Woodwork* decision has not altered the balance between permissible primary and prohibited secondary activity. Thus the fact that Enterprise had as one object of its boycott the enforcement of its legitimate work preservation agreement with Hudik does not exculpate the union of 8(b)(4) charges if another object of the action was the application of pressure to Austin to prevent the use of prepiped Slant/Fin units.[83]

The majority skirts the effect of the inclusive language of section 8(b)(4)(B) by insisting that the

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highlighted the significance of the statutory language in his supplementary analysis:

> Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words "for the purpose of" and inserting the clause "where an object thereof is." Obviously the intent of the conferees was to close any loophole which would prevent the Board from being blocked in giving relief against such illegal activities simply because one of the purposes of such strikes might have been lawful.

93 CONG. REC. 6859, II 1947 Leg. Hist. 1623. The Supreme Court reiterated the importance of this statement in IBEW v. NLRB, 341 U.S. 694, 700 (1951): "[I]t is sufficient that *an* objective of the [union action], although *not necessarily the only* objective" is to cause a secondary employer to cease doing business with another person. (Emphasis in original.)

[82] Carpet Layers Local 419 v. NLRB, 151 U.S.App.D.C. 338, 345 n.13, 467 F.2d 392, 399 n.13 (1972) (emphasis in original).

[83] Though the ALJ did not articulate this precise conclusion, his determination that the work preservation boycott could only achieve its purpose if it resulted in a modification of the general contractor's project specifications is a functional equivalent.

provision cannot in all reason be construed to preclude enforcement of a valid collective bargaining agreement. But we have been cautioned not to expand the Union's right to strike beyond the limits prescribed by the Act. The principle that "a violation of the secondary boycott provisions cannot be justified by a contractual arrangement between the union and the neutral employer" [84] dates to the Supreme Court's 1958 *Sand Door* decision.[85] There the Court recognized that a union might be left "with a valid contractual provision and with no means of enforcing it other than in a civil suit." [86] The majority position is largely premised on the legitimacy of the Union's work preservation goal,[87] but this court has

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[84] NLRB v. Carpenters, District Council of New Orleans, 407 F.2d 804, 806 (5th Cir. 1969); Associated General Contractors of California, Inc. v. NLRB, —— F.2d —— (No. 73-3354, 9th Cir., filed Mar. 28, 1975); ACCO Construction Equipment, Inc. v. NLRB, 511 F.2d 848 (9th Cir. 1975); NLRB v. International Board of Electrical Workers, 405 F.2d 159 (9th Cir. 1968); *see also* Ohio Valley Carpenters District Council v. NLRB, 339 F.2d 142, 145 (6th Cir. 1964) ("a legal contract does not immunize illegal action employed for its enforcement"); *cf.* Local 5, Plumbers & Pipefitters v. NLRB, 116 U.S.App.D.C. 100, 104, 321 F.2d 366, 370, *cert. denied*, 375 U.S. 921 (1963) ("regardless of the legitimacy of the end sought by the union, it cannot engage in secondary pressure to obtain it").

[85] Local 1976, Carpenters & Joiners v. NLRB, 357 U.S. 93, 105 (1958).

[86] *Id.*

[87] The standard employed by the majority is even more monolithic and unrealistic than the majority's characterization

given unequivocal support to the almost tautological view that legitimate ends may not be pursued by unlawful means.[88] Where the valid goal of compelling compliance with a contractual provision combines with the unlawful object of pressuring neutral or secondary employers to achieve that goal, the statute will not permit a union to engage in economic action.

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of the Board's right-to-control test. For the majority the sole determinant of employer liability to economic action is the existence of a work preservation agreement. This assumption suggests that by acquiring pacts, agreements and contractual provisions, explicit or implicit, which guarantee work to the union, the union is able to immunize itself from liability for economic actions. The equation is, contractual provision plus violation equals legitimate strike. But a realistic appraisal of the construction industry defies this simplistic analysis. Work preservation agreements for crafts are ubiquitous; if each can be enforced by economic action, regardless of secondary effects, product boycotts will be validated wholesale and unions will effectively dictate both which projects their employers can undertake and what the details and specifications of the projects will be. Thus to look solely to the existence of a work preservation agreement or understanding, without examining the particulars of its creation and reasonable scope, is to adhere to a unitary and impractical standard in the manner which the majority explicitly disapproves. At the least, the Board's formula is the product of and reflects intimate familiarity with the vertical organization of craft unions, the forces prompting their proliferation, and the complex matrix of hot cargo, union signatory and work preservation clauses surrounding construction projects, a web commonly weaved to lend all strikes and boycotts the dignity of primary action.

[88] Local 5, Plumbers & Pipefitters v. NLRB, 116 U.S.App. D.C. 100, 321 F.2d 366, *cert. denied*, 375 U.S. 921 (1963); *and see* note 78 *supra*.

Analysis of the object of economic action taken to enforce a contractual provision would be strained if the purpose of the provision itself were not considered. The *National Woodwork* Court noted that union economic activity enforcing contractual provisions was prohibited where "*the agreements and boycott* were tactically calculated to satisfy union objectives elsewhere."[89] The Court's awareness that admittedly valid contractual clauses may have secondary objects and that their enforcement may offend the Act's ban on secondary pressures recalls an observation of the *Sand Door* Court:

> The realities of coercion are not altered simply because it is said that the employer is forced to carry out a prior engagement rather than force now to cease doing business with another. A more important consideration, and one *peculiarly within the cognizance of the Board* . . . is the possibility that the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned. [T]o allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers.[90]

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[89] 386 U.S. at 64-45 (emphasis added).

[90] 357 U.S. at 106 (emphasis added).

Partly in response to *Sand Door*,[91] Congress enacted section 8(e) to prohibit even the execution of "hot cargo" clauses,[92] The *proviso* permitting "hot cargo" agreements for jobsite construction work, included "because of the close community of interests there," [93] was intended to reduce periodic strikes and boycotts occasioned by the peculiar circumstances of the construction industry.[94] Thus, although Congress and the Court have sanctioned particularly restrictive clauses in the context of jobsite construction work since the *Sand Door* decision, the Court is no less

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[91] The case held that while a union could not strike to enforce an employer's agreement not to handle nonunion goods, voluntary adoption and observance of such a condition was not prohibited by section 8(b) (4) (A).

[92] 386 U.S. at 634-35.

[93] *Id.* at 639.

[94] Elucidating its conclusion that the *proviso* was prompted by the "close community of interests" on the jobsite, the *National Woodwork* Court cited the Third Circuit's opinion in Essex County v. NLRB, 332 F.2d 636 (1964), where the following explanation is offered:

> This limited exception was granted apparently in recognition of the problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project. The exemption does not extend to other agreements such as those relating to subcontracts for supplies and materials to be transported to and delivered on the construction site.

Cited at 386 U.S. 612, 639 n.32. *See also* Connell Construction Co. v. Plumbers Local 100, 43 U.S.L.W. 4657, 4661-62 (U.S. June 2, 1975).

suspicious of clauses negotiated and enforced to serve secondary purposes, simply because they appear in construction contracts. Here the Board, with its unique perspective on labor practices and pressures, has considered the relative individual and institutional strengths of the contracting parties, the practical purposes of work preservation clauses, and the realistic effect of the Union's economic action. After consideration of all these factors the Board has determined the Enterprise's enforcement of its work preservation clause against Hudik has a substantial secondary object and secondary effects of impermissible magnitude, and has concluded that the Union's boycott violates section 8(b)(4)(B). The means by which the Board reached this result satisfy the requirements of the statute and the case law, including *National Woodwork*: the *prima facie* right-to-control test rests on the Board's considered judgment that a subcontractor's inability to affect or avoid prefabrication specifications in general contracts renders him an inappropriate and impermissible target of union economic activity. The majority has not shown an adequate basis for upsetting that decision.

D. *The Union's Alternative Remedies*

The majority disapproves the Board's result as well as its analysis, suggesting that the NLRB is not empowered to define the arsenal of economic weapons each party to a labor dispute may use.[95] This

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[95] At the close of its footnote 34 the majority insists that the Board is not authorized to function as an arbiter of the eco-

challenge is more plausible, for it is the basis on which the *National Woodwork* Court indicated it would have considered the test, had the issue been presented in that case.[96] But since the Board's decision rests on its interpretation of 8(b)(4) and not on an equitable attempt to fashion bargaining parity, its result satisfies the guidelines set forth by the Supreme Court in *NLRB* v. *Insurance Agents' International Union.*[97]

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nomic weapons respective parties may employ, in order to achieve and maintain what it deems a proper balance between the power of labor and management. This delimitation of Board authority is founded on specific language in NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 497-98 (1960). But nothing the Court or the Congress has said detracts from Board authority to proscribe the use of the economic weapon of a boycott where an object of the action is the bringing to bear of secondary pressures. To the contrary, judicial decision and legislative enactment give emphatic support to that prohibition and compel the Board to enforce the statutory stricture. When a legitimate contractual provision cannot be enforced by strike without a violation of section 8(b)(4), the Board is charged with removing that weapon from the union's arsenal and requiring the use of alternatives such as arbitration or lawsuit for breach of contract.

[96] Not before us, therefore, is the issue argued by the AFL-CIO in its brief *amicus curiae*, namely, whether the Board's "right-to-control doctrine—that employees can never strike against their own employer about a matter over which he lacks the legal power to grant their demand"—is an incorrect rule of law inconsistent with the Court's decision in *Labor Board* v. *Insurance Agents' International Union*, 361 U.S. 477, 497-98.

386 U.S. at 616 n.3.

[97] 361 U.S. 477, 497-98 (1960).

In *Insurance Agents* the Court rejected a distinction which the Board essayed, between the traditional "total strike" and concerted on-the-job harassment. The Board had concluded that the latter variety of economic action constituted a refusal to bargain collectively in violation of section 8(b)(3); the Court could find no basis for the Board's ruling within that statutory provision. Neither did the Act permit the Board's conclusion that the union's tactics—demonstrations, leafletting, and refusal to co-operate with company rules and policies—were beyond the protection of section 7 and 8(a)(1) of the statute. Because of the "lack of relationship to the stautory standard inherent in" the Board's distinctions, the Court rejected them. Significantly, the Court observed that

> when the Board moves in this area, *with only § 8(b)(3) for support*, it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.[98]

The right-to-control test has a legal as well as a factual component. The standard is predicated on the Board's determination that subcontractors who lack influence over project specifications cannot realistically be the targets of craft unions' work preservation boycotts and that union pressure in such instances is more logically considered to be aimed at general contractors and engineers who require the use

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[98] *Id.* at 497 (emphasis added).

of prefabricated products. When the Board examines the facts surrounding a particular work preservation dispute and concludes that the true object of the union's action is to force a change in the project designs of engineers and general contractors, it denies the union's right to enforce the work preservation clause in contravention of section 8(b)(4)(B). Clearly this scheme bears a close relation to the statutory standards of the National Labor Relations Act, for by factual determinations and legal conclusions well within its province the Board identifies and prohibits economic actions with secondary objects. This role is readily distinguishable from the one the Board assumed in *Insurance Agents*, where the line drawn between various species of concerted activitiy was not founded on specific statutory language.

Moreover, the notion that certain types of contractual provisions might be enforceable by lawsuit but not by economic action did not perish with the *Sand Door* holding when Congress enacted section section 8(e). In a remarkably lucid and unequivocal passage of legislative history the Conference Committee which submitted 8(e) to the Congress announced that construction subcontracting agreements authorized by the *proviso* to section 8(e) should not be enforceable by strike or boycott:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 (1958)). To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e). The proviso applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project.[99]

In *Orange Belt District Council of Painters, No. 48* v. *NLRB*,[100] this court reasserted the *Sand Door* principle that economic actions enforcing certain valid contractual terms would violate section 8(b)(4). Speaking with reference to "union signatory" provisions, Judge Wright asserted that

> [s]econdary subcontracting clauses in the construction industry are lawful, under the *proviso* to Section 8(e), and economic force may be used to obtain them notwithstanding Section 8(b)(4)(A) . . . . But under Section 8(b)(4)(B) such

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[99] H.R. REP. No. 1147, 86th Cong., 1st Sess. 39 (1959).

[100] 117 U.S.App.D.C. 233, 328 F.2d 534 (1964).

secondary clauses may be enforced only through lawsuits, and not through economic action.[101]

The *National Woodwork* holding did not undermine this proposition; rather the Court determined that primary work preservation agreements properly enforceable under section 8(b)(4) were not prohibited by section 8(e).[102] This determination did not preclude

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[101] *Id.* at 236, 328 F.2d at 537 (footnotes omitted). A year earlier, in Local 5, Plumbers & Pipefitters v. NLRB, 116 U.S. App.D.C. 100, 103, 321 F.2d 366, 369, *cert. denied*, 375 U.S. 921 (1963), a panel of this court referred to two cases involving attempts to change purchasing policies of general contractors. The court observed:

> Both of these cases reflect a situation similar to the present one, for in both the union brought pressure on a subcontractor who was powerless to settle the dispute, as Akron here, in order to affect the purchasing policies of a general contractor. The only significant difference in this case is that the union attempted to influence the subcontracting policies on the general contractor, rather than its purchasing policies. There is nothing in the statute to indicate that this difference should produce a dissimilar result, for in both cases we have a secondary boycott.

(Footnote omitted.) This reasoning supports an analogy between union signatory and work preservation boycotts: both sorts of contract terms have been specifically validated (union signatory by enactment of the section 8(e) construction *proviso*, work preservation by *National Woodwork*), yet neither may be enforced where the subcontractor's lack of control demonstrates the union's action has a secondary object.

[102] This determination is not the logical equivalent of the proposition the majority derives from *National Woodwork*: that work preservation is a valid primary purpose, that work preservation clauses therefore comply with section 8(e), and that their enforcement must satisfy section 8(b)(4). The more precise holding of the case is that 8(b)(4) and 8(e)

the conclusion, reached by the Fourth Circuit in *George Koch*,[103] that work preservation agreements whose enforcement would be proscribed by 8(b)(4) might nevertheless be valid under 8(e), for the simple reason that a subcontractor's inability to cease using prefabricated products—his "lack of control over disputed work"—defeats a finding of "secondary pressures" [104] absent enforcement of the clause. This case presents that precise situation: the work preservation agreement between Hudik and Enterprise does not constitute a forbidden "agreement . . . whereby [the] employer . . . agrees to cease or refrain from handling . . . any of the products of any other employer . . .," according to the precept of *National Woodwork*, yet the Union cannot reasonably strike to enforce the provision without exerting secondary pressures prohibited by section 8(b)(4). The majority cites to Justice Stewart's dissenting view concerning the illogic of this position, but fails to recognize both the thrust

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do not prohibit primary activity directed to work preservation; primary activity is in turn defined as pressure levelled against an immediate employer because of some disagreement between boycotting employees and the boycotted employer. Where the Board determines that the operative dispute is in fact with a different employer and that the principal object of the boycott is to change that party's work policies, the work preservation shibboleth cannot render the economic action permissible under sections 8(b)(4) and 8(e).

[103] George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1978).

[104] *Cf.* 386 U.S. at 638.

of his argument [105] and the fact that the Court's opinion in *National Woodwork* did in fact allow the possibility that section 8(b)(4) sweeps wider than section 8(e).[106]

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[105] Majority Op. at 32 n.38. Justice Stewart attempted to demonstrate that any contractual provision invalid under section 8(b)(4) when enforced should similarly be invalid under section 8(e), whose "sweep" he found to be coterminous with that of 8(b)(4). Because he recognized that enforcement of work preservation provisions might violate 8(b)(4)—in fact, in his opinion the statute condemned all product boycotts—he believed that under 8(e) such provisions should not be permitted in collective bargaining agreements. The *National Woodwork* majority would not give so broad an interpretation to 8(e). Because the majority's opinion left open the possibility that a clause whose enforcement would constitute secondary activity illegal under 8(b)(4) might not be condemned under 8(e), he offered this argument, to expand interpretation of 8(e), not to constrict section 8(b)(4).

[106] The Court concluded that Congress meant sections 8(e) and 8(b)(4)(B) to prohibit only "secondary" objectives, and that primary work preservation clauses were valid under both provisions of the Act. A subcontractor's work preservation agreement would clearly be primary if it were given the construction the ALJ placed on Rule IX of Hudik's collective bargaining agreement with Enterprise: the employer will preserve for the union all its traditional work which he has the ability to assign. This type of provision, innocuous by the standards of 8(e), nevertheless clearly violates 8(b)(4) when the union strikes for the right to perform work over which the employer has no effective control.

Even if the ALJ's interpretation of Rule IX is rejected, a work preservation agreement could satisfy 8(e) but offend 8(b)(4) if, for example, it were a lawful primary clause enforced against a neutral employer. *Cf.* 386 U.S. at 632: "In effect Congress, in enacting § 8(b)(4)(A) of the Act [the predecessor of the present 8(b)(4)(B)], . . . barred as a secondary boycott union activity directed against a neutral em-

The majority opinion conveys a sense that a work preservation clause would be valueless if it were not enforceable by economic action, and argues that surely the Union did not bargain for a nugatory contractual right. But the ALJ has suggested the function of such clauses: they insure that an employer who in fact has an opportunity to assign work traditionally performed by members of the union representing his employees will not voluntarily order prefabricated goods in derogation of the contract term. In fact the work preservation clause may be given greater impact. If the agreement is interpreted to apply to work beyond the control of the subcontractor at the time he signs the subcontract, he might agree to pay to the union in a contract suit the value of traditional work he cannot assign to his employees. Contrary to the majority's view that the burden of offering this compensation rests on the employer, the union should pursue an appropriate adjustment, resorting to judicial enforcement when necessary. Neither the Su-

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ployer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere." The Court noted in *National Woodwork* that the redrafting of the provision was intended to insure that lawful primary activity would remain legitimate under 8(b)(4). But although the case validates the concept of primary work preservation, it does not sanction the full panoply of secondary means of enforcing work preservation clauses. Thus a clause which on its face did not constitute an "agreement . . . to cease or refrain from handling . . . any of the products of any other employer" according to the precept of *National Woodwork* might nevertheless by its enforcement reflect a secondary object of changing the labor policies of a neutral employer.

preme Court in *Sand Door* nor the Congress that enacted section 8(e) found the concept of enforcement by lawsuit to be disrespectful of employee or union interests. Without speculating over the wisdom—or necessity—of such contractual arrangements, we may note that employers gain considerable bidding flexibility by them, and that they promote resolution of work preservation disputes by an orderly legal process. By endorsing this scheme the Board does not "bail out" delinquent employers, but rather serves the legitimate end of contractually appointed work preservation without unnecessary and unlawful economic dislocations.

E. *Conclusion*

Reduced to its essentials, this case questions the power of the Board (1) to decide that certain kinds of valid contractual provisions cannot be enforced by economic action without prohibited secondary effects and objects, and (2) to draw the line between permissible primary and unlawful secondary activity at the point where subcontractors employing members of particular craft unions lose meaningful control over conflicts between contracts and collective bargaining agreements. Though they did not address the problem in these precise terms, the circuits which considered the right-to-control test prior to *National Woodwork* upheld without dissent the Board's right to treat control over the assignment of disputed work as the discriminant of primary status.

National Woodwork is an inadequate justification for completely abandoning the logic of these earlier

rulings. The decision constitutes a "delineation of that degree of proof which establishes a permissible primary boycott but falls short of evidencing the interdicted secondary boycott." [107] It asserts that a boycott tactically calculated to satisfy objectives elsewhere is prohibited secondary activity.[108] Thus a Board ruling that under all the surrounding circumstances Enterprise could only have sought to influence the labor policies of Austin, the general contractor, and Slant/Fin, the manufacturer, would seem to satisfy *National Woodwork's* definition of an 8(b)(4) violation. Yet the majority balks at the Board's decision, in part because its analysis ignores the ALJ's thorough discussion of relevant subcontracting practices in the New York City construction industry, and in part because it cannot allow a violation of a collective bargaining agreement to go unremedied by economic action. There may be some question whether Rule IX was in fact violated; there is little doubt that a strike to enforce the Union's literal construction of its terms has as its only logical purpose the exertion of pressure on Austin and other engineers and general contractors who specify the use of prefabricated products.

The majority is not compelled to consider the fact that the result it reaches strips subcontractors of opportunities to bid on projects with prefabrication

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[107] George Koch Sons, Inc. v. NLRB, 490 F.2d 323, 327 (4th Cir. 1973).

[108] 386 U.S. at 644.

specifications, divests designers and architects of meaningful control over the details of their projects, and simultaneously increases the costs of construction projects suited to prepared components. But it should not fail to recognize that the boycott it sanctions is both a "sword" and a "shield," [109] that Hudik is simultaneously a vehicle for exerting pressure on Austin, the party responsible for the use of prepiped climate control units, and a buffer, whose contractual obligation insulates Enterprise from legal responsibility for its secondary activity. Because I read *National Woodwork* to prohibit "offensive" economic actions serving secondary goals, and because to deny that Austin is the true object of the Union's boycott would be disingenuous, I respectfully dissent.

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[109] *Cf. National Woodwork*:

> It is arguable that Congress may have viewed the use of the boycott as a sword as different from labor's traditional concerns with wages, hours, and working conditions. But the boycott in the present cases was not used as a sword; it was a shield carried solely to preserve the members' jobs.

386 U.S. at 630.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 73-1764

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition to Review and Cross-Application to Enforce an Order of the National Labor Relations Board

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Before: BAZELON, Chief Judge, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges, sitting *en banc*

JUDGMENT

This cause came on to be heard on a petition to review and cross-application to enforce an order of the

National Labor Relations Board and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court *en banc* that this case is hereby remanded to the National Labor Relations Board, for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: July 1, 1975

Opinion for the Court filed by Circuit Judge Wright.

Concurring opinion filed by Chief Judge Bazelon.

Dissenting opinion in which Circuit Judges Tamm, Robb and Wilkey join, filed by Circuit Judge MacKinnon.

APPENDIX C

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO *and* THE AUSTIN COMPANY, INC. CASE 29-CC-336

July 5, 1973

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

On March 20, 1973, Administrative Law Judge Ramey Donovan issued the attached Decision in this proceeding. Thereafter, the Respondent and the General Council filed exceptions and briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith, and to adopt his recommended Order.

The Charging Party, hereinafter referred to as Austin, is the general contractor and engineer for the

construction of the Norwegian Home for the Aged. Austin, as engineer, prepared the job specifications for the construction of the Norwegian Home, and these job specifications called for the installation of climate control units manufactured by Slant/Fin Corporation, herein called Slant/Fin. These job specifications further required that the main water flow and condensate assembly for the climate control units was to be factory installed. Pursuant to an agreement with Slant/Fin, Austin purchased the climate control units and received these units at the jobsite in June 1972.

Austin had entered into a subcontract with Hudik-Ross Co., Inc., herein called Hudik, to install the Slant/Fin climate control units. At the time it executed the subcontract, Hudik was aware that the units it was to install contained internal piping that had already been cut and threaded.

Hudik was a union contractor and has had a collective-bargaining agreement with the Respondent for many years, covering Hudik's employees. Rule IX of the agreement provided that employees of Hudik were to cut and thread internal piping in climate control units their employer contracted to install. As stated, however, the subcontract between Austin and Hudik required that the union steamfitters employed by Hudik were to install the Slant/Fin units and connect these units to the main water pipes, without performing any work on the internal piping of the units.

On June 22, 1972, shortly after the Slant/Fin units had arrived on the jobsite, William B. Daly, a business

agent for the Respondent, told Peter Plath, Austin's representative and project superintendent at the Norwegian Home jobsite, that the Respondents' members would not install the Slant/Fin units because the internal piping of the units was not to be installed in accordance with rule IX of the agreement between Hudik and the Respondent. Daly also spoke to the Hudik superintendent and to Frank Hudik, president of Hudik, and informed them that the Slant/Fin units would not be installed for the same reason. Subsequently, the Respondent continued to refuse to install the units.

We agree with the Administrative Law Judge that the Respondent thereby violated Section 8(b)(4)(i) and (ii)(B) of the Act. We note that refusal of the Respondent to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, the subcontractor, and was for the purpose of preserving work they had traditionally performed. However, Hudik was incapable of assigning its employees this work; such work was never Hudik's to assign in the first place. Moreover, we note that the Respondent informed Austin, who did not employ employees represented by the Respondent and had no agreement with that Union, that it would not let Hudik install the climate control units involved. Considered together these facts clearly indicate that the Respondent was exerting prohibited pressure on Hudik with an object of either forcing a change in Austin's manner of doing business or forcing Hudik to terminate its

subcontract with Austin. Since the pressure exerted by the Respondent on Hudik was undertaken for its effect on other [neutral] * employers, this pressure was secondary and prohibited by Section 8(b)(4)(B).[1]

Accordingly, we find that by its conduct the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic

* The word "neutral" was deleted from the Board's decision by an order issued by the Board on August 30, 1973 (see 171a, *infra*).

[1] See *Local Union No. 438, United Association Of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (George Koch Sons, Inc.)*, 201 NLRB No. 7; *Local No. 742, United Brotherhood of Carpenters and Joiners of America, John Foremen, Business Agent, and Harold Stolley, Stewart (J. L. Simmons Company, Inc.)*, 201 NLRB No. 8; *International Brotherhood of Electrical Workers, Local Union 995, AFL-CIO (Saia Electric, Incorporated)*, 201 NLRB No. 39. In view of our finding that Respondent's actions were undertaken for a secondary objective, we find it unnecessary to pass upon the Administrative Law Judge's finding that Austin and Slant/Fin were the primary employers. Hence, we are not deciding herein whether picketing or other actions brought to bear directly against Austin and Slant/Fin would constitute lawful primary activity.

Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Brooklyn, New York, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

DECISION

RAMEY DONOVAN, Administrative Law Judge: The charge in this case was filed on October 6, 1972, by the Austin Company, Inc., herein Austin, against Enterprise Association, Steam Fitters, Local No. 638, U.A., AFL-CIO, herein the Union.[1] A complaint issued on October 26, 1972, alleging that the Union Respondent had engaged in conduct violative of Section 8(b)(4)(i) and (ii)(B) of the Act. Respondent in its answer denied the commission of the alleged unfair labor practices.

The case came to be heard before Administrative Law Judge Ramey Donovan on November 15, 1972, in Brooklyn, New York. At the hearing the parties agreed and proposed that the record, including the transcript of testimony and exhibits, before United States District Judge Bruchhausen on November 2, 1972, in the case of Samuel M. Kaynard, Regional Director of Region 29 of the National Labor Relations Board against the instant Respondent Union, 72-Civil-1339, in a Section 10(l) proceeding of the

[1] The full name of the Union is set forth in the caption of this case, above.

Act, be incorporated into and constitute the record in the instant proceeding. Accordingly, the agreement and proposal was placed into effect.

FINDINGS AND CONCLUSIONS

Slant/Fin Corporation, herein called Slant/Fin, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

At all times material herein, Slant/Fin has maintained its principal office and place of business at 100 Forest Drive at East Hills in the Town of Greenvale, State of New York, where it is, and has been at all times material herein, engaged in the manufacture, sale and distribution of heating, ventilating and air-conditioning units, and related products.

During the past year, which period is representative of its annual operations generally, Slant/Fin, in the course and conduct of its business operations, manufactured, sold, and distributed at its place of business, products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said place of business in interstate commerce directly to States of the United States other than the State in which it is located.

Slant/Fin is, and has been at all times material herein, a person engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (6), and (7), and 8(b)(4) of the Act.

Austin is, and has been at all times material herein, a corporation duly organized under, and existing by virtues of, the laws of the State of Ohio.

At all times material herein, Austin has maintained its principal office and place of business at 450 West First Avenue, in Roselle, New Jersey. It is, and has been at all times material herein, engaged in business of providing and performing engineering and general contracting services and related services at various building and construction jobsites in various states of the United States, including the States of New Jersey and New York.

During the past year, which period is representative of its annual operations generally, Austin, in the course and conduct of its business, purchased and caused to be transported and delivered, *inter alia*, to its place of business in Roselle, New Jersey, and to various building and construction jobsites in the State of New York, building supplies and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its place of business and to said jobsites in interstate commerce directly from States of the United States other than the States in which said place of business and jobsites are located.

Austin is, and has been at all times material herein, a person engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1) (6), and (7) and 8(b)(4) of the Act.

Hudik-Ross Co., Inc., herein called Hudik-Ross, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

At all times material herein, Hudik-Ross has maintained its principal office and place of business at 251 West 42d Street, New York, New York. It is, and has been at all times material herein, engaged in the business of providing and performing heating, ventilation, and air-conditioning services and related services at various building and construction jobsites in the State of New York.

During the past year, which period is representative of its annual operations generally, Hudik-Ross, in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business, and to various building and construction jobsites in New York State, heating, ventilating, and air-conditioning supplies, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to said place of business and to said jobsites in interstate commerce directly from States of the United States other than the State in which said place of business and job sites are located.

Hudik-Ross is, and has been at all times material herein, a person engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (6), and (7) and 8(b)(4) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

THE ALLEGED UNFAIR LABOR PRACTICES

Austin is the general contractor and engineer on a construction job known as the Norwegian Home For the Aged. Austin prepared the engineering job specifications for the Norwegian Home. As general contractor, Austin, a union contractor, itself employed on the job laborers, carpenters, bricklayers, cement finishers, ironworkers, and operating engineers. Austin subcontracted the electrical, plumbing, sprinkler, heating, ventilation, and air-conditioning work to various subcontractors. As the result of competitive bidding, Hudik received the subcontract for heating, ventilating, and air-conditioning work on the Home.

The relevant specification prepared by Austin for heating and air-conditioning units at the Norwegian Home job is dated November 29, 1971. *Inter alia*, the specification provided:

> Furnish at the jobsite Slant/Fin Climate Command Air Conditioners. The unit shall be complete with cabinets, filters, cooling chasis, heating coil fans, main water flow and condensate assembly . . . .
>
> * * * *
>
> The main flow and condensate assembly shall be factory installed as an integral part of the unit by the manufacturer . . .
>
> * * * *
>
> Manufacturer shall furnish a written guarantee for a period of one year after completion of installation . . . .

In short, Austin, as engineer and general contractor on the job, had decided upon and specified that the heating and air-conditioning work, which it let out for bids to subcontractors, would involve, *inter alia*, the installation of specific equipment that Austin had purchased or was in the process of purchasing. The specific equipment was the named Slant/Fin units with factory-installed water flow and condensate assembly. In substance, the units would have pre-piped water flow and condensate assemblies when they arrived at the jobsite for installation by the heating and air-conditioning subcontractor.

The subcontract between Austin and Hudik was entered into on January 14, 1972, and incorporated therein were the specifications aforesaid.[2] Since the subcontract had been awarded to Hudik by Austin as the result of competitive bidding, I am satisfied that Hudik was aware of the specifications prior to making its bid and at the time it executed the subcontract.[3]

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[2] There is a "Lump Sum Subcontract" which refers to "Purchase Order and Subcontract" with reference to specifications. A purchase order and subcontract, which, like the lump sum contract, is dated January 14, 1972, incorporates the Slant/Fin specification, above, "into this subcontract."

[3] While Frank Hudik, president of Hudik-Ross, who testified that he was not aware of the Slant/Fin aspect of the subcontract until after the latter was signed, may not have personally read the specifications before the subcontract was signed, a Hudik company representative, project engineer Chersin, made the estimate of the job and submitted the bid.

[Footnote continued on page 149a]

Hudik, a union contractor, whose employees are members of the Union, has had a contract with the Union for many years, including the period encompassed by the events in the instant case.[4] Rule IX of the contract provides:

> Radiator branches, convector branches and coil connections shall be cut and threaded by hand on the job in accordance with Rule V. [Rule V provides that work in the union's jurisdiction must be performed in units of two; i.e. two steamfitters or a steamfitter and an apprentice.]

Since the Slant/Fin heating and cooling units, which are specified and purchased by Austin for the Norwegian Home job, had their internal piping for main water flow and condensate assembly installed

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[3] [Continued]

Although Chersin was not called as a witness, Frank Hudik was asked:

> Q. And in accordance with the practice in your business, the estimator reads the plans and specifications and calculates how much he can do the job for, and then signs the bid letter; is that correct?
>
> A. Yes.
>
> Q. And in this particular job, Mr. Chersin did the estimating?
>
> A. That's correct.

In addition to having estimated Hudik's bid for the contractor, Chersin, according to Frank Hudik, "was our representative on the job and he was running the job to see that the work went in properly and conformed to the plans and specifications."

[4] Austin employs no steamfitters or members of Local 638 on the Norwegian job and it does not have a contract with Local 638.

at the Slant/Fin factory, a fact set forth in the specifications, the union steamfitters employed by Hudik would not be called upon to perform the internal piping in the units but would simply be expected to install the Slant/Fin units and connect the units in the Norwegian Home.[5]

Zimmerman is a member of the Union and he has been employed by Hudik for 13 years. On the Norwegian Home job, Zimmerman was, in substance, Hudik's job foreman and he was in charge of the job. Zimmerman was also the union job steward on the Norwegian job.

About June 22, 1972, the Slant/Fin units that had been specified and purchased by Austin and which Hudik, under its subcontract with Austin, was to install in the Norwegian Home, arrived at the jobsite. Zimmerman participated in the unloading. He notified Daly, business agent of the Union, of the situation. Daly told him to hold off any installation of the units. Daly and Zimmerman inspected the units. Plath, project superintendent for Austin, testified that on the morning of June 22, 1972, Daly told him that his (Daly's) men would not install the Slant/Fin units because the piping inside the units was steamfitters' work. Daly also spoke to the Hudik superintendent and to Frank Hudik. In substance, he said that the factory-installed internal piping in the units, the main

[5] The Slant/Fin aspect of Hudik's subcontract with Austin was not the only work being performed by Hudik's union steamfitters on the Norwegian job but it is only the Slant/Fin aspect that is in issue herein.

water and condensate assembly, was in violation of rule IX of the union contract with Hudik and that such piping was Local 638's work. Hudik said that the units were already preassembled and pretested in the factory when they arrived on the job and that his company had not been the purchasers of the units. Also, as we have seen, it was Austin, not Hudik, that had drawn up the specifications and had specified Slant/Fin units.

Thereafter, at frequent intervals on the jobsite, Plath, in conversations with Zimmerman, was told that Zimmerman and his men were still under instructions from the Union not to install the Slant/Fin units. This situation continued on through August 1972, including the period where the entire Norwegian Home job had progressed to the point where the construction schedule called for the installation of the units. Respondent union has continued to refuse to install the units and as far as appears from the record this situation has not changed.

Zimmerman, under examination by Respondent's counsel, testified that he has been a steamfitter for 22 years. He was asked to and did describe the technical aspects and functions of the components of the Slant/Fin units, presumably based upon his inspection of them when they arrived at the Norwegian Home jobsite. He testified that there were other units on the market "similar to these [Slant/Fin units]." He named one such unit as American Standard. Counsel then named various components and functional arrangement in the Slant/Fin units, as had

been described by Zimmerman, and asked him if they were also present in the American Standard Units. Zimmerman testified, in effect, that there were similarities and differences, e.g., both units have fans and air-conditioning components but, unlike Slant/Fin, American Standard does not have a bypass arrangement nor does it have a condensor. Zimmerman testified that on other jobs Local 638 members had performed the piping in the American Standard unit on the jobsite.

The foregoing testimony, in my opinion, is of a rather limited nature, confined as it is to some component comparisons between two heating and cooling units. Undoubtedly there are similarities but the fact is that Austin, the engineer and general contractor for the entire job, had made an engineering and business judgment that the Slant/Fin units were to be used on the project and Austin was aware of, and specified, that these units were factory prepiped, tested, and guaranteed by the manufacturer.[6]

Daly testified that the Union has never met with Slant/Fin representatives nor has it sought to secure a contract with that Company. The testimony is not controverted and there is no evidence of any organizational approach to Slant/Fin employees by the Union or an effort to have Slant/Fin employ Local 638 members.

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[6] Frank Hudik testified that he was familiar with the American Standard unit but stated that it and the Slant/Fin unit "are very much different." Hudik then proceeded to explain the differences in some detail including differences in design and concept.

The General Counsel contends that Respondent has a primary dispute with Slant/Fin and that Slant/Fin is the primary employer; that Respondent caused Hudik's employees to refuse to work on and install the Slant/Fin units, with an object of forcing Hudik to cease using, handling, or dealing with the Slant/Fin units that contain factory-installed internal piping; and with an object of forcing Hudik to cease doing business with Austin and thereby force or require Austin to cease using the Slant/Fin units and cease doing business with Slant/Fin regarding the latter's factory-piped units. Such conduct is claimed to be in violation of Section 8(b)(4)(i) and (ii)(B) of the Act and cases are cited in support of this contention.

The Respondent's position is that its dispute is with Hudik and that the latter was not a neutral party but a party who had a contract with Respondent requiring that piping work be performed on the jobsite and that Hudik sought and secured a contract with Austin which, in effect, negated Respondent's contract right to perform piping work on the jobsite by reason of the fact that the specified Slant/Fin units had factory-installed internal piping. Respondent attacks the "right of control" doctrine, citing cases, and relies strongly on the *National Woodwork* case [7] as defining the distinction between primary and secondary activity.

The facts in the instant case are similar to those considered by the Board in the *Mechanical Contrac-*

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[7] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

tors of Detroit case.[8] Page Plumbing was the mechanical contractor in that case; Hudik in the instant case. The Detroit case job was a hospital building; Norwegian Home in the instant case. The engineer and architect retained by the hospital specified in the plans for heating and cooling units that the units be fan coil units in which the piping was factory installed. Austin, as engineer and general contractor, who performed the engineering and specifications, is the equivalent of the hospital's engineer and architect in the cited case. Page bid on the hospital job with knowledge of the specifications and that the units would have factory installed piping; and, in the instant case, the units with factory piping were the Slant/Fin units. The union thereafter told Page that the union members employed by Page were, under the union contract with Page, entitled to perform the piping work on the jobsite and the union directed or induced the Page employees not to install the units with factory-installed piping.

The Board found a violation of Section 8(b)(4)(i) and (ii)(B) of the Act since Page was not the primary employer inasmuch as Page as the subcontractor was obliged to install the specified prepiped units and had neither drawn up nor did it control the specified units. The Board also set forth its interpretation

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[8] *Local 636, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, AFL-CIO (Mechanical Contractors Association of Detroit, Inc.)*, 177 NLRB 189.

of the Supreme Court's *National Woodwork* decision, *supra*, and noted the Court's express statement that the Board's "right of control" test was not before the Court in that case. Moreover, in my opinion, the instant contract between Hudik and the Union, in providing that pipe would be cut and threaded on the job, necessarily implied that it referred to pipe within Hudik's control and which could be cut on the job. Neither Hudik nor the Union in their contract could prescribe nor were they prescribing the treatment of pipe that was within or had been within the control of some other party, either a contractor, manufacturer, or engineer alone, or a contractor, manufacturer, or engineer and their own respective employees. In *National Woodwork*, Frouge, the subcontractor, had not only the choice of using nonpremachined or premachined doors and chose the latter, but Frouge's contract with the union stated that the union "will not handle" premachined doors. There is no such provision in the instant Hudik contract with the Union. While the latter distinction is real it is not a major basis of my decision.

In the instant situation, since Hudik is neither the manufacturer of prepiped units (Slant/Fin) nor is it the engineer and general contractor (Austin) who specified the use of particular prepiped units, it is apparent that the Union's dispute or problem is with Slant/Fin and Austin. Enforcing a union contract with Hudik to prevent Hudik's installing prepiped units that were neither manufactured nor specified by Hudik is simply a use of Hudik as an instrumentality

or means of exerting pressure against Slant/Fin and Austin. The Union's real problem and dispute is with the manufacturer of prepiped units and the engineer who specifies that such units are to be used. That Hudik is only a means or instrumentality for exerting pressure against Slant/Fin and Austin with whom the Union has its primary dispute, will appear if we consider two possible situations.

Example A is where Hudik or similar union subcontractor is invited to bid on a job where prepiped units are to be installed. The Union reminds Hudik of the terms of the union contract requiring on the job piping. Hudik therefore does not bid and does not get the job, or if he does bid and obtains the subcontract, his union employees refuse to install the prepiped units. The construction site, however, in example A, is in an area where the engineer and general contractor are then able and willing to secure a nonunion subcontractor or a subcontractor employing members of a union who are not adverse to installing prepiped units. The job is therefore completed without Hudik and his employees. Assume that this pattern is repeated on other jobs in the area and with the same results. It is clear therefore that in example A, the Union's problem and dispute is not with Hudik since Hudik, despite voluntary or unvoluntary compliance with the union contract, is an ineffective means or instrumentality "under all the surrounding circumstances" [9] for exerting pressure against the

[9] The quoted phrase is from the *National Woodwork* decision, *supra*.

manufacturer of prepiped units or the engineer specifying their use. The Union's problem or dispute is with the last two mentioned parties, not with Hudik. Union enforcement of the Union-Hudik contract in example A does not preserve work for the Union but serves to deprive Hudik and its employees of work. The Union does not exist as an organization whose purpose is to deprive its members of work. It is apparent that the Union's dispute is not with Hudik but that it is with the manufacturer and the party specifying prepiped units.

Example B is of course the instant case. The sole difference between A and B is that in the instant case, B, Hudik is an effective means or instrumentality for exerting the economic pressure of the Union against Slant/Fin, the manufacturer, and Austin, the engineer. In example A Hudik was an ineffective means or instrumentality against the manufacturer and the engineer. The reason for the difference between being an effective or ineffective instrumentality for pressure in the two examples is revealed by considering all the surrounding circumstances. In the instant case, the matter occurs in New York City, where the construction site is in an area where there are no nonunion steamfitters available or no nonunion mechanical contractors; or, if either of the nonunion categories exist, neither Austin, the union general contractor and engineer, nor Hudik, the union subcontractor could or would see them.[10] That is the reason

[10] In my opinion, it is an appropriate subject of official notice that in New York City and probably in all or most of

why the union steamfitters, employees of Hudik, by refusing to install Slant/Fin specified by Austin are able to use Hudik as an effective means or instrumentality for exerting pressure against Slant/Fin and Austin. The true "culprits" and the parties with whom the Union has its dispute are Slant/Fin, who manufactures prepiped units, and Austin, who specified such units as the heating and cooling units for installation in the Norwegian Home. If prepaid units cannot be installed in the large commercial, public, and industrial buildings in the New York area or in other areas effectively organized by the Union and other building trades unions, the manufacture will be materially affected and Austin and other engineers and general contractors will not specify their purchase and use in buildings.

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the major cities in this country, the building and construction industry is unionized, certainly with respect to major industrial, commercial, and public construction. Unionized in this context means that craft unions affiliated with the AFL-CIO represent and have contracts for the employees who work on such projects and, in fact, the unions are the source of the labor supply and furnish the employees to the employer-contractors. The strategic position of the unions in the industry is confirmed by the fact that governmental efforts to increase the number of minority employees in the industry are concentrated on the unions and not on the employers. In most industries, if it is desired to increase the number of minority employees, governmental pressure is effectively directed to the employers. But in the construction industry it is the unions that control the labor supply and if the union steamfitter employees of Hudik on the Norwegian job refuse to work, other steamfitters will not be available to Hudik or to anyone else to perform work on the job.

But the fact that in example A, above, Hudik would be an ineffective means of pressure by the Union against Slant/Fin and Austin, and, in example B, the instant case, Hudik is an effective means of pressure in view of all the surrounding circumstances, does not alter the fact that in both situations, Hudik is a means or instrumentality and that the Union's primary dispute is with Slant/Fin and Austin.

In both the *Mechanical Contractors of Detroit* case, *supra*, and in the instant case, the subcontractors, Page and Hudik, respectively, could have refrained from bidding on the respective jobs on the ground that the engineering specifications provided that the units to be installed had prepiped components. All neutral and secondary employees can avoid union pressure by not doing business with, or by ceasing to do business with, the primary employer, the party with whom the Union has a dispute. Thus, a union has a dispute and a strike with employer A about a layoff of some of A's employees or about wages. To exert pressure on A the union induces a strike among the employees of employer B who is the normal supplier of raw materials to A. B could have avoided being subjected to this secondary boycott if B had ceased doing business with A as soon as the union called a strike against A.

Since the Union, in the instant case, asserts that its dispute is with Hudik and that by directing Hudik's steamfitters not to install the Slant/Fin units, the Union claims that it is simply seeking to have Hudik abide by the union contract, we might presume that

the Union would have been happy and content if Hudik had never sought or received the Norwegian Home contract or if Hudik would breach his subcontract as soon as the Union reminded Hudik of rule IX in the union contract. But, if Hudik, an employer of union steamfitters, does not bid on jobs and does not secure subcontracts, how does such a situation preserve or increase work for Hudik's union steamfitters; and the preservation of work and the maximizing of work opportunities is presumably the purpose of rule IX in the Hudik-union contract. If, as the Union asserts, its dispute is solely and primarily with Hudik and is based on enforcement of the union contract with Hudik, there is nothing that Hudik could have done to comply with the contract and with the Union's claimed objective except not bid on the contract originally or withdraw from the contract. How does such an alleged primary dispute with Hudik and its alleged objective, if attained, enable Hudik, the employer and primary party to the dispute, to either preserve or give work to his steamfitters on the Norwegian Home job, except if, under all the surrounding circumstances, Hudik is a means or instrumentality by which the Union exerts effective pressure against Austin and Slant/Fin, the primary employers.

If Hudik had bid on and had secured a subcontract wherein Hudik was to purchase and install heating and cooling units of his choice, subject only to certain engineering performance specifications as to the

units Hudik could be and would be the true primary party to a dispute with the Union concerning enforcement of the latter's contract with Hudik. If Hudik purchased prepiped units and sought to have his union employees install such units. Union pressure in the form of a refusal to work would be directed against Hudik who, in view of the contract, was obligated to abide by it and was in a position to select units that were not prepiped. The pressure against Hudik would be against the party who, by abiding by the contract, would preserve work for his employees and maximize their work opportunity. The same would be true if Hudik secured a subcontract where the general contractor and engineer had purchased and sent nonprepiped units to the jobsite for installation by Hudik but Hudik sent the units to a job shop for installation of internal piping and then requested his steamfitters to install such job shop piped units.

In both the foregoing illustrations it is apparent that Hudik was the primary employer and that the Union's dispute was with Hudik because the latter was the party in control of situations as to whether the units were prepiped or piped on the jobsite. Hudik's contract with the Union required that Hudik's work be performed on the jobsite. In the suppositions [sic] illustrations, Hudik's work under the contract was work controlled by Hudik in the same sense that the Hudik contract with the Union regarding wages referred to wages controlled by Hudik, i.e., Hudik and the Union in entering the contract were establishing wages for Hudik's employees in the New

York area; they were not contracting for the wages to be paid by mechanical contractor A to A's employees in El Paso since Hudik had no legitimate control over that situation.

The majority decision in the *National Woodwork* case, *supra*, in setting forth the facts in that case, included the fact that Frouge, the contractor corresponding to Hudik herein, had control of the decision as to the use on the job of nonpremachined doors or of premachined doors. Thus:

> Although Frouge's contract and job specifications did not call for premachined doors, and "blank" or "blind" doors could have been ordered, Frouge contracted for the purchase of premachined doors. . . .

In the course of the majority decision, the Court cited the *Fibreboard* case,[11] which it described as a case involving "an alleged refusal to bargain with respect to the contracting out of plant maintenance work previously performed by employees in the bargaining unit." The Court also cited language in *Fibrebard* regarding the fact that provisions "relating to contracting out" work exist in many contracts. In any event it is clear that "Fibreboard was in control of the decision to either continue to have its own maintenance employees perform plant maintenance work or to contract out work. It is difficult to see why, if a union struck either A, a supplier of raw

[11] *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964).

materials to *Fibreboard* or B, an installer of *Fibreboard* finished products, as methods of exerting pressure on *Fibreboard*, that *Fibreboard* would not remain the primary employer that had control of its maintenance work and of the decision to contract it out or not. The sole control of the situation that exists in the supplier or installer is to exert pressure on the primary party in whom control of the contracting out rests. This would remain true whatever the particular means that the Union selected for exerting pressure on the primary party who was the source of the Union's basic problem. And in the companion cases to *National Woodwork*, where no violations were also found, the subcontractors had been in control of the material and had purchased precut rolls of wire and precut and premitered asbestos fittings, respectively, and had thus deprived their own employees of customary on the job work.[12]

While it is true that there are conflicting interpretations of the *National Woodwork* decision, *supra*, I believe that under the Board's view of the law the Respondent herein has violated Section 8(b)(4)(i) and (ii)(B) of the Act since Hudik was a secondary employer that, unlike Frouge in the *National Woodwork* case, had no control over the selection and specification of the prepiped units.[13] Austin had neither a

[12] *Houston Insulation Contractors Association* v. *N.L.R.B.*, 386 U.S. 664 (1967).

[13] *Mechanical Contractors of Detroit, supra; Local No. 742, United Brotherhood of Carpenters and Joiners of America (J. L. Simmons Company, Inc.)*, 178 NLRB 351; *International*

contract with Respondent nor did it employ steamfitters at the Norwegian Home job. The same is true of Slant/Fin. The work stoppage was directed at Austin and through Austin at Slant/Fin by the means of applying pressure against Hudik, the secondary employer.

CONCLUSIONS OF LAW

1. Austin, Slant/Fin, and Hudik are engaged in commerce within the meaning of Section 2(6) and (7) and Section 8(b)(4)(B) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging individuals employed by Hudik to engage in a strike and in a refusal in the course of their employment to handle and work upon factory piped heating and cooling units manufactured by Slant/Fin, which Hudik was required by its contract with Austin to install in the Norwegian Home being constructed by Austin as engineer and general contractor, and by coercing and restraining Hudik, an object thereof being to force or require Hudik to cease using factory piped heating and cooling units and cease doing business with Austin and Slant/Fin, Respondent had engaged and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

Association of Heat and Frost Insulators and Asbestos Workers, Local 12, AFL-CIO (Westinghouse Electric Corporation), 193 NLRB 40; *Beacon Castle Square Building Corporation* v. *N.L.R.B.*, 406 F.2d 188 (C.A. 1, 1969).

THE REMEDY

Having found that Respondent has engaged in specified unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and to take affirmative action to effectuate the purposes of the Act.

ORDER [14]

Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from engaging in, or in any manner, including orders, directions, instructions, or appeals, however given, made, or imparted, inducing or encouraging any individual employed by Hudik-Ross Co., Inc., or by any other person engaged in commerce or in a industry affecting commerce to engage in a strike or in a refusal in the course of his employment: (a) to handle or work on factory-piped heating and cooling units or related products where

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[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations; be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Hudik-Ross Company or other person is required by contract to use such products; or (b) to use, manufacture, transport, process, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or, in any manner, or, by any means threatening, restraining, coercing Hudik-Ro[illegible]ompany, or any other person engaged in commerce or an industry affecting commerce, where an object of any of the foregoing conduct is to force or require Hudik-Ross Company or any other person to cease using, selling, handling, transporting, or otherwise dealing in factory-piped heating and cooling units or related products, when required to do so by contract, or to cease doing business with Austin Company, Inc., or with Slant/Fin Corporation.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Withdraw and rescind any and all orders, directions, instructions, requests, or appeals pursuant to which employees of Hudik-Ross Company refused at the site of construction of the Norwegian Home for the Aged, in New York, either to unload, handle, work upon, or install, in said Home under construction, factory-piped heating and cooling units.

(b) Post at its office copies of the attached notice marked "Appendix." [15] Copies of said notice, on forms

[15] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

provided by the Regional Director for Region 29, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Deliver to the Regional Director for Region 29, signed copies of said notice in sufficient number for posting by Hudik-Ross Company, Austin Company, and Slant/Fin Corporation, they being willing, at all locations where notices to their respective employees are customarily posted.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial in which the parties were represented by their attorneys it has been found that we have violated the National Labor Relations Act in certain respects and we have been ordered to take certain remedial action.

WE WILL NOT in any way order, direct, instruct, urge, ask, persuade, or influence our members or order individuals employed by Hudik-Ross Company to refuse to unload, handle, work upon, or install factory piped heating and cooling units or similar equipment where Hudik-Ross is required by building specifications or contract to install such equipment.

WE WILL NOT call a strike, or, in any way, order, direct, instruct, urge, ask, persuade, or influence our members or other individuals employed by Hudik-Ross Company or by any other company to refuse to do any work, nor will we put pressure of any kind on Hudik-Ross Company or any other company where our purpose in doing any of these things is: (1) To force Hudik-Ross Company or any other company to stop using, selling, handling, transporting, or dealing in any factory piped heating and cooling units or similar equipment where Hudik-Ross Company or any other company is required to do so by building specifications or contract; or (2)

to force Hudik-Ross Company or any other company to stop doing business with Austin Company or Slant/Fin Corporation.

WE WILL, and we do now, cancel, revoke and withdraw the orders and instructions given to our members and other individuals employed by Hudik-Ross Company not to unload, handle, work upon, or install factory piped heating and cooling units at the Norwegian Home For The Aged.

WE WILL, and we do now, notify our members and other individuals employed by Hudik-Ross Company that we have no objection to their unloading, handling, working upon, or installing factory piped heating and cooling units at the Norweigian Home For The Aged.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York 11201, Telephone 212—596-3535.

Brooklyn, N.Y.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 28-CC-336

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

and

THE AUSTIN COMPANY, INC.

ORDER CORRECTING DECISION AND ORDER

On July 5, 1973, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding [1] in which an inadvertent error appears.

IT IS FURTHER ORDERED that said Decision and Order be, and it hereby is, corrected by deleting the word "neutral" from the sixteenth line of the Decision on page 3.

---

[1] 204 NLRB No. 118.

IT IS FURTHER ORDERED that the Decision and Order, as printed, Shall appear as hereby corrected.

Dated, Washington, D.C., August 30, 1973.

By direction of the Board:

George A. Leet

Associate Executive Secretary

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 596572 104

MOTION FILED

JAN 8 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON BEHALF OF PUBLIC SERVICE ELECTRIC & GAS COMPANY AND AMERICAN CYANAMID COMPANY AS *AMICI CURIAE*

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IN THE

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OCTOBER TERM, 1975

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PUBLIC SERVICE ELECTRIC & GAS COMPANY AND AMERICAN CYANAMID COMPANY

To The Honorable Chief Justice and Justices of The Supreme Court of the United States:

The motion of Public Service Electric & Gas Company and American Cyanamid Company respectfully shows to the Court:

1. Public Service Electric & Gas Company (hereinafter Public Service) is a New Jersey corporation and the eighth largest public utility in the United States. American Cyanamid Company is a New York based corporation engaged in the manufacture of chemicals and allied products with plants throughout the United States. The movants have participated in this case as amici before the United States Court of Appeals for the District of Columbia Circuit. In that court, the movants filed an extensive brief in support of the position of the National Labor Relations Board (hereinafter the Board). The movants have also participated as amici before the Board in its consideration of similar issues in *Local 438 Plumbers and George Koch Sons, Inc.*, 201 NLRB 59 (1973), and *Local 742 Carpenters (J.L. Simmons Company)*, 178 NLRB 351, enforcement denied and remanded, 444 F.2d 895 (D.C. Cir. 1971). In addition, the movants filed an amici brief and participated in oral argument in the Fourth Circuit's consideration of the *Koch* case. *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1971). Respondent has declined its consent but does not oppose this motion. After discussion with the Office of the General Counsel consent by the Board appeared certain but was not pursued in view of Respondent's position.

2. The question before the Court is of vital concern to each of the moving companies and to the individuals and industries they service. The facilities of Public Service constitute a vital link in the interconnected system known as the Pennsylvania-New Jersey-Maryland connection (PJM). In order to sustain its position in that system, Public Service, which provides service to approximately six million people, is continously engaged in a program of construction and maintenance. Its construction program is an ongoing endeavor which will involve

the expenditure of billions of dollars. For example, it is presently engaged in the construction of two multi-million dollar nuclear generating stations within the State of New Jersey and is in an advanced planning stage for a third facility utilizing nuclear power. Similarly, American Cyanamid is continually engaged in construction projects at its plants throughout the United States.

3. The essential issue raised by this Petition is whether a union violates the secondary boycott provisions of the National Labor Relations Act when it induces its members to refuse to handle prefabricated goods that their employer's contract obligates the employer to install or utilize. As the construction work of Public Service and American Cyanamid is performed exclusively by union labor, the resolution of that issue will have a significant impact upon the labor cost which they incur and upon their decision to utilize such materials in the future.

4. As a public utility, the rates of Public Service are subject to the closest possible public scrutiny and are inextricably intertwined with the public interest. Its obligation to avoid escalating construction costs, which must ultimately be borne by the consumer, and to provide the best possible service at the lowest possible cost, is a public trust which it must fulfill. Similarly, American Cyanamid in its obligation to its stockholders, employees and customers is also concerned with both the cost of construction and the avoidance of labor disputes which inhibit and delay such projects.

5. Clearly the Board's approach to this issue recognizes the construction industry's critical need for technological development which is dependent in such large measure upon prefabrication. Rejection of that approach would severely impede Public Service and American Cyanamid,

as well as companies similarly situated, in their continuing struggle to keep pace with the needs of our society. Moreover, rejection of the Board's position will have an adverse radiating effect upon companies and their employees engaged in the manufacture of prefabricated materials. Accordingly, the participation of Public Service and American Cyanamid will provide an extra dimension to the arguments presented by the Board and Respondent as they will present to the Court the views of the purchasers of construction whose interest will be vitally affected by the Court's decision.

WHEREFORE, Public Service Electric and Gas Company and American Cyanamid Company respectfully move this Court for leave to file their joint brief as amici curiae in support of the Petition of the National Labor Relations Board for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

APRUZZESE & MCDERMOTT
A Professional Corporation
Attorneys for Movants

By: VINCENT J. APRUZZESE
A Member of the Firm

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON BEHALF OF PUBLIC SERVICE ELECTRIC & GAS COMPANY AND AMERICAN CYANAMID COMPANY AS *AMICI CURIAE*

Introduction

This brief on behalf of Public Service Electric & Gas Company and American Cyanamid Company, as *amici curiae*, is filed pursuant to leave of Court granted upon

motion made in accordance with Supreme Court Rule 42(1). It is in support of the Petitioner, the National Labor Relations Board.

Interest of Amici

Public Service Electric & Gas Company (hereinafter Public Service), the eighth largest public utility in the United States serving approximately six million consumers, together with American Cyanamid Company, (hereinafter American Cyanamid) a principal manufacturer of chemicals and allied products with plants throughout the United States, have participated in this proceeding as *amici curiae* before the United States Court of Appeals for the District of Columbia Circuit. They have also participated as *amici curiae* in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1971), a case in which the Fourth Circuit, contrary to the court below, approved the Board's "right-to-control" test in similar factual circumstances.

The question presented by this Petition is of vital concern to each of the moving companies and to the persons and industries they serve. Indeed its impact is such that it may properly be regarded as one of the most significant issues which the Court has been petitioned to hear in the field of construction labor law in recent years.

The facilities of Public Service constitute a vital link in the interconnected system known as the Pennsylvania-New Jersey-Maryland connection (PJM). In order to sustain its position in that system, Public Service has embarked upon a major and continuing program of construction and maintenance. Ultimately, this program will involve an expenditure of billions of dollars. For example, it is presently engaged in the construction of two multi-

million dollar nuclear generating stations within the State of New Jersey and is in an advanced planning stage for a third such facility. Similarly, American Cyanamid is continually engaged in construction projects at its plants throughout the United States. Both companies perform such construction exclusively with union labor.

The use of prefabricated materials in the making of repairs and in new construction is obviously of immediate and critical concern to Public Service and American Cyanamid, as well as to millions of other purchasers of construction. Moreover, the right of such purchasers to elect to use prefabricated materials free from fear of labor retaliation warrants judicial protection.

As a public utility, the rates of Public Service are subject to the closest possible public scrutiny and are inextricably intertwined with the public interest. Its obligation to avoid excessive construction costs, which must ultimately be borne by the consumer, and to provide the best possible service at the lowest possible cost, is a public trust which it must fulfill. American Cyanamid, in its obligation to its stockholders, employees and customers, is similarly concerned with both the cost of construction and the avoidance of labor disputes which inhibit and delay such projects.

The Board's approach to the issue presented is consistent with established principles of labor law and contributes to an economic atmosphere in which technological progress may be achieved. Rejection of that approach would severely impede Public Service and American Cyanamid as well as other purchasers of construction in their continuing struggle to keep pace with the needs of our society. Accordingly, *amici* strongly support the Petition of the National Labor Relations Board.

Reasons for Granting the Writ

1. It has long been recognized by this Court that the relationship of labor and management in the construction industry is *sui generis*. *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 (1951). Labor relations in the construction industry are infinitely more complex than in the manufacturing industry. A manufacturer deals directly with the labor organization representing each and every one of its employees. Therefore, it may control its own destiny in the labor relations arena.

In contrast, the construction of a school, hospital, plant or a nuclear energy facility represents the combined efforts of many employers and their employees. Each subcontractor, whether it employs electricians, plumbers, steamfitters or members of another trade, must enter into a collective bargaining relationship with the particular craft union representing its employees. Thus, no single contractor, albeit the general contractor or a subcontractor, enjoys the unity of control over labor relations which is inherent in the manufacturing industry.

In a very real sense, a general contractor has no control over a subcontractor's labor relations and vice-versa. Therefore, when considered in the context of these multiple relationships, it is evident that a work preservation provision such as that contained in the collective bargaining agreement between Hudik-Ross Company, Inc. (hereinafter Hudik) and the Respondent herein must control only the relations of *that* employer with *its* employees. Such provision did not confer upon Hudik any degree of control over the decision of the purchaser of the construction, the Norwegian Christian Home for the Aged (hereinafter the Home), to utilize climate control units with prefabricated internal piping. It represented nothing more than

an agreement by Hudik not to use prefabricated materials *insofar as it was within its control not to do so*. Thus, as the Board and the Fourth Circuit held in *Koch, an* object of the union's pressure must necessarily have been secondary.

It appears the Home was influenced in its decision to use prepiped Slant/Fin control units by the fact that such units carried a one-year warranty *contingent upon the factory fabrication of the internal piping*. Nevertheless, regardless of the underlying reasons for the decision, and whether made by the Home independently or by its general contractor, the Austin Co., Inc., the work preservation provision of Hudik's contract could not radiate upward to influence or control that decision.

Over the years contractors have been confronted by the efforts of craft unions to radiate their control upward[1] or downward[2] for work to be done at the job site, or laterally[3] for supplies or equipment purchased off the job site but to be used at the situs of construction. Each of these efforts was designed to overcome the secondary boycott proscriptions of the National Labor Relations Act[4] (hereinafter the Act). While in some limited instances

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[1] *N.L.R.B.* v. *Local 164, I.B.E.W.*, 388 F.2d 105 (3rd Cir. 1968).

[2] *Construction Laborers* v. *N.L.R.B. (Colson & Stevens Construction Co.)*, 323 F.2d 422 (9th Cir. 1973), modifying 137 NLRB 1650); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975).

[3] *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967).

[4] National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq.

these tactics have been sanctioned,[5] the principles established by this Court in *Denver Building Trades* remain a fixture of construction labor law.

In *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975), this Court pointed out that one of the major aims of the 1959 amendments to the Act was to limit "top down" organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of its employees. 421 U.S. at 632. Similarly, rejection of the Board's "right-to-control" approach would permit unlawful pressure from the bottom up to be placed upon a party which, by its inability to satisfy the union demands, is a neutral to the dispute. As pointed out by the dissenting opinion in the instant case "[T]he Union's dispute cannot logically be solely with the subcontractor but must instead be also with the party who dictates that prefabricated products shall be employed: the owner, the designer, the general contractor." *Enterprise Association Local 638* v. *N.L.R.B.*, 521 F.2d 885, 932, 933 (D.C. Cir. 1975). Such conduct traditionally has been construed as unlawful secondary activity regardless of whether the union may also have had a legitimate work preservation objective. *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 (1951); *N.L.R.B.* v. *Local 825 Operating Engineers*, 400 U.S. 297, 305 (1971).

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[5] In *Colson & Stevens*, 137 NLRB 1650 (1962), a unanimous five member Board, after extensive review of the legislative history of the 1959 amendments, concluded that Congress did not intend to change existing law with regard to the illegality of picketing to *obtain* and enforce so called "hot cargo" agreements. In *Northeastern Indiana Building and Construction Trades Council (Centlivre Village Apartments)* 148 NLRB 854 (1964) the Board regretably reversed *Colson & Stevens*. The Board's action in *Centlivre, supra*, has never been approved by this Court. See *Connell Construction Co., Inc.*, 421 U.S. 616, 633 footnote 14. Consequently the problems created by *Centlivre* remain with us and are reflected in the decision below.

2. Unfortunately, the District of Columbia Circuit and those circuits which concur in its view[6] proceed from the erroneous premise that the decision of this Court in *National Woodwork Mfgs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612 (1967) justifies their conclusion. Such reliance is clearly misplaced. In *National Woodwork* this Court expressly declined to pass upon the Board's "right-to-control" test noting that it was not an issue in that case, as there the contractor (Frouge) *did* have the ability to grant the union's demand that the doors utilized be machined at the jobsite.[7] Significantly, prior to *National Woodwork* the District of Columbia Circuit as well as the Second, Sixth and Seventh Circuits had expressed their approval of the Board's view.[8]

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[6] *N.L.R.B. v. Local 164, IBEW*, 388 F.2d 105 (3rd Cir. 1968); *American Boiler Manufactures' Association* v. *N.L.R.B.*, 404 F.2d 556 (8th Cir. 1968); *Local 626, Plumbers* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir. 1970); *Local 742 Carpenters* v. *N.L.R.B.*, 444 F.2d 895 (D.C. Cir. 1971); *Western Monolithics Concrete Products Inc.* v. *N.L.R.B.*, 446 F.2d 522 (9th Cir. 1971); *Compare Associated General Contractors of California Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975).

[7] *National Woodwork Mfgs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 616, footnote 3 (1967).

[8] *Local 5, Plumbers* v. *N.L.R.B.*, 321 F.2d 366 (D.C. Cir. 1963) cert. denied, 375 U.S. 921 (1963); *Local 636, Plumbers* v. *N.L.R.B.*, 278 F.2d 858 (D.C. Cir. 1960); *N.L.R.B.* v. *Enterprise Ass'n.*, 285 F.2d 642 (2nd Cir. 1960); *Ohio Valley Carpenters District Council* v. *N.L.R.B.*, 339 F.2d 142 (6th Cir. 1964); *N.L.R.B.* v. *I.L.A., Local 1694*, 331 F.2d 712 (3rd Cir. 1964); *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.*, 354 F.2d 594 (7th Cir. 1965), reversed on other grounds, 386 U.S. 612 (1967); *N.L.R.B.* v. *Local 157 Plumbers*, 369 F.2d 388 (7th Cir. 1966).

If anything is to be inferred from the Court's express refusal to pass upon this issue in *National Woodwork*, it is that the Court perceived a critical factual distinction in situations where control was absent. In any event, the conclusion does not follow that by declining to consider the Board's "right-to-control" test the Court rejected that criteria.

3. Only the decision of the Fourth Circuit in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323, 327 (4th Cir. 1973), approving the Board's test and in direct conflict with the instant case, recognizes the express limitations of *National Woodwork* and the factual distinction between *National Woodwork* and *Koch*. The same distinction is present here. If indeed the teachings of *National Woodwork* are to be followed, the principle must be preserved that in distinguishing between lawful work preservation and unlawful secondary activity the "touchstone" is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer, vis-a-vis his own employees.[9]

Similarly, guidance may be found in this Court's decision in *Connell* which recognized the unlawful consequences which result when the lack of a contractor's "right-to-control" is ignored. For just as Connell, a general contractor, could not legally control the labor relations of its subcontractors, so too in the instant case Hudik could not control the selection of materials by the project general contractor. Hudik's agreement with the union, therefore, must be viewed as one wherein it agreed that *it would not on its own initiative elect to use* prefabricated materials *where not required to do so* by the job specifications.

[9] *National Woodwork Mfgs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 645 (1967).

To give broader reach to the Union's work preservation provision would not only permit an unlawful intrusion upon the right of Hudik to carry on its business with others, but would also permit the Union by secondary activity to intrude upon the relationships of the general contractor with the buyer and the buyer with the manufacturer. It is, therefore, clear that if the law of secondary boycotts is to be properly applied the Board's approach must be sustained.

4. The present conflict among the circuits in this critical area of labor law leaves purchasers of construction, such as amici, in a position where they must either forego the economic advantages of technological progress or incur the risk of labor difficulty and its concomitant delays and added costs. With the energy crisis facing our nation, power companies and others involved with meeting the needs of the public, should not be engulfed in squabbles between contractors and unions over how a particular job must be done, when, in fact, the overriding concern should be that the job be accomplished as efficiently and economically as possible. It is therefore of vital concern to Public Service Electric & Gas Co., other public utilities, American Cyanamid Co., other consumers of construction, and the public at large that the Court grant the Board's Petition.

CONCLUSION

The conflict among the circuits represented by the decision below and that of the Fourth Circuit in *Koch* leaves unsettled a vital interpretation of the National Labor Relations Act. Accordingly, the Court is respectfully urged to grant the Petition.

Respectfully submitted,

APRUZZESE & MCDERMOTT
A Professional Corporation

VINCENT J. APRUZZESE
A Member of the Firm

Supreme Court, U. S.
FILED
DEC 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1975

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NATIONAL LABOR RELATIONS BOARD,
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Respondent.

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(1) and (3) of the Rules of this Court, the Air-Conditioning and Refrigeration Institute, Associated Builders and Contractors, Inc., American Boiler Manufacturers Association, American Consulting Engineers Council, The American Institute of Architects, Air Moving and Conditioning Association, Inc., Architectural Woodwork Institute, Mechanical Contractors Association of America, Inc., National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association respectfully move this Court for leave to file a brief as *amici curiae* in support of the petition for

writ of certiorari filed by the National Labor Relations Board in this case on November 28, 1975. In support of this motion, the above-named asosciations show as follows:

1. This motion for leave to file is necessary under Rule 42(1) and (3) because counsel for the Respondent Union has advised the undersigned in writing that he will not consent to the appearance of any *amicus curiae* in support of the petition in this case.

2. The issue presented by the petition for certiorari involves the validity of the "right to control" test used by the National Labor Relations Board in determining whether an employer being subjected to coercive union pressures in a work assignment dispute is a neutral employer entitled to protection from such coercion under Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B) (1970).

3. The status of the "right to control" doctrine is presently in dispute. The NLRB thoroughly analyzed and reaffirmed its adherence to the doctrine in *Local 438, United Association (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), and has continued to apply it. Since that decision, the doctrine has been specifically approved by the Fourth and Ninth Circuits (*George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973) and *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975)), but it was rejected by the District of Columbia Circuit in the instant case by a vote of five to four.

4. Application of the "right to control" test has a substantial impact on the ability of building trades unions to effectuate product boycotts on construction projects. Such boycotts are a major weapon used by the unions to exclude prefabricated and factory-assem-

bled products and materials from construction sites and force resort to less efficient, and frequently less satisfactory, jobsite fabrication techniques. In *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.*, 386 U.S. 612 (1967), this Court upheld the right of a union to engage in such a boycott for work preservation purposes in the limited circumstances in which the decision whether or not to use prefabricated products lay within the discretion of the striking employees' own immediate employer. In many instances, however, the authority to decide what products or methods of fabrication will be used rests exclusively with some third person who owes the union no collective bargaining duty, such as the architect, the consulting engineer, the project owner, or the manufacturer of the product in question, and the jobsite subcontractor is simply hired to install the completed product in accordance with their specifications. Yet, even in these circumstances, building trades unions frequently seek to exclude prefabricated products from the project to force other modifications in the project specifications by striking or threatening to strike the subcontractor who employs their members on the job. The "right to control" doctrine recognizes that economic pressures directed against the subcontractor in such circumstances are secondary and unlawful, unless the subcontractor's inability to control assignment of the work in question is the result of his own efforts to insulate himself from union work preservation pressures. Consequently, application of the "right to control" test effectuates the Congressional purpose of Section 8(b)(4)(B) by providing jobsite contractors with effective protection against involvement in disputes which they are powerless to resolve. It also protects the right of architects, engineers, builders and manufacturers to utilize the products and fabrication techniques best suited to the needs of their projects without interference from unions to whom they owe no bargaining duty.

5. The associations joining this motion have a substantial interest in the question thus presented by the petition for certiorari in this case. They represent a broad cross-section of the construction industry, including the designers, specifiers, manufacturers and installers of products and materials used in construction throughout the United States. Members of AIA, ACEC and NSPE design, specify and provide engineering services on all types of construction and therefore have a major role in deciding whether or not prefabricated and factory-assembled products are to be used in construction. ABMA, AMCA, ARI, AWI, NEMA and NWMA members are manufacturers of these products. They are installed by, among others, members of ABC and MCAA. The associations joining herein therefore have broad knowledge of problems arising out of efforts to exclude manufactured products from construction sites and of the effectiveness of the "right to control" doctrine in preventing such efforts. In particular, they have had experience with a number of product boycotts attributable, at least in part, to the present uncertainty about the validity of the "right to control" test. They have participated individually and jointly in numerous cases before the NLRB and the courts in which the validity and application of the doctrine have been litigated, including joint participation as *amici curiae* in each of the cases referred to in paragraph 3, above, as well as the proceedings before the court of appeals in the instant case. Because of this background and the extensive experience their constituents have had with product boycotts, the associations joining herein are uniquely situated to brief this Court on the practical, as well as the legal, reasons for granting the writ of certiorari in this case.

6. If granted leave to file, the movants will submit their *amicus curiae* brief a reasonable time prior to consideration of the petition for writ of certiorari.

The movants' *amicus curiae* brief will be short and can be submitted to the Court in printed form within 15 days following notification to counsel of the granting of this motion.

WHEREFORE it is respectfully moved that the above-named associations be granted leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari in this case.

Respectfully submitted,

KENNETH C. MCGUINESS
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for *Amici Curiae*

Dated at Washington, D.C.,
this 15th day of December, 1975.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of Motion for Leave to Submit Brief as *Amici Curiae* in Support of Petition for Writ of Certiorari have this day been served by certified mail, return receipt requested, upon the following parties:

Robert H. Bork, Esq.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Norton J. Come, Esq.
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Martin R. Ganzglass, Esq.
Delson & Gordon
1900 L Street, N.W.
Washington, D.C. 20036

KENNETH C. MCGUINESS
Counsel for *Amici Curiae*

Dated at Washington, D.C.,
this 15th day of December, 1975.

Supreme Court, U.S.
FILED
MAY 10 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COUFT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Docket Entry
10/6/72	Charge Filed, NLRB Case No. 29-CC-336
10/26/72	Complaint and Notice of Hearing issued
10/31/72	Order Rescheduling Hearing issued
11/2/72	Hearing in Section 10(1) Proceeding, Case No. 72-Civil-1339
11/9/72	Respondent Union's Answer in NLRB Case No. 29-CC-336
11/15/72	Hearing opened in NLRB Case No. 29-CC-336
11/15/72	Hearing closed in NLRB Case No. 29-CC-336
3/30/72	Administrative Law Judge's Decision issued
4/11/72	Respondent Union's Exceptions to the Decision of the Administrative Law Judge, received
4/12/73	General Counsel's Exceptions to the Administrative Law Judge's Decision, received
7/5/73	Decision and order issued by the National Labor Relations Board, dated
8/30/73	Order Correcting Decision and Order, dated
7/1/75	Decision of Court of Appeals
7/1/75	Judgment of Court of Appeals
2/23/76	Order of Supreme Court granting certiorari

FORM NLRB 508 (12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

DO NOT WRITE IN THIS SPACE

Case No.: 29-CC-336

Date Filed: 10-6-72

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor Organization or its Agents against which charge is brought
   a. Name: Enterprise Association, Steam Fitters, Local No. 638, U.A., AFL-CIO
   b. Union Representative to Contact: William B. Daley
   c. Phone No.: 674-3937
   d. Address (Street, city, State and ZIP code): 841 Broadway, New York, New York
   e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) 4(i)(ii)(B) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.
2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about August 7, 1972, the above designated labor organization, by its officers, agents and/or officials has engaged in, or induced or encouraged individuals employed by The Austin Company, Inc. Hudik-Ross, Inc. and other persons engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services and/or has threatened, coerced or restrained The Austin Company, Inc. Hudik-Ross, Inc. and other persons engaged in commerce or an industry affecting commerce, where in either case an object thereof is forcing or requiring the Austin Company, Inc. and Hudik-Ross, Inc. to cease using, selling, handling, transporting or otherwise dealing in the products of Slant/Fin Corporation, or to cease doing business with Slant/Fin Corporation.

3. Name of Employer: The Austin Company, Inc.
4. Location of Plant Involved (Street, city, State and ZIP code): 450 West 1st Avenue, Roselle, New Jersey 07203
5. Type of Establishment (Factory, mine, wholesaler, etc.): General Contractor
6. Identify Principal Product or Service:
7. No. of Workers Employed: 300
8. Full Name of Party Filing Charge: The Austin Company, Inc.
9. Address of Party Filing Charge (Street, city, State and ZIP code): 450 West 1st Ave., Roselle, New Jersey 07203
10. Telephone No.: 201-245-4000

11. Declaration:
I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ (illegible)
(Signature of representative or person making charge)

District Superintendent
(Title or office, if any)

Address 450 West 1st Ave., Roselle, N.J. 07203

(Telephone number): 201-345-4000

(Date): October 6, 1972

Willfully false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 29

Case No. 29-CC-336

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

and

THE AUSTIN COMPANY, INC.

COMPLAINT AND NOTICE OF HEARING

It having been charged by The Austin Company, Inc., herein called Austin, that Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region 29, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The Charge in this proceeding was filed by Austin on October 6, 1972, and served by registered mail upon Respondent on or about October 6, 1972.

2. (a) Slant/Fin Corporation, herein called Slant/Fin, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Slant/Fin has maintained its principal office and place of business at 100 Forest Drive at East Hills in the Town of Greenvale, State of New York, where it is, and has been at all times material herein, engaged in the manufacture, sale and distribution of heating, ventilating and air-conditioning units, and related products.

(c) During the past year, which period is representative of its annual operations generally, Slant/Fin, in the course and conduct of its business operations, manufactured, sold and distributed at its place of business, products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said place of business in interstate commerce directly to states of the United States other than the state in which it is located.

(d) Slant/Fin is, and has been at all times material herein, a person engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(1), (6) and (7), and 8(b)(4) of the Act.

3. (a) Austin is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Ohio.

(b) At all times material herein, Austin has maintained its principal office and place of business at 450 West First Avenue, in the City of Roselle, State of New Jersey. It is, and has been at all times material herein, engaged in the business of providing and performing engineering and general contracting services and related services at various building and construction jobsites in various states of the United States, including the states of New Jersey and New York.

(c) During the past year, which period is representative of its annual operations generally, Austin, in the course and conduct of its business, purchased and caused to be transported and delivered, *inter alia*, to its place of business, in Roselle, New Jersey, and to various

building and construction jobsites in the State of New York, building supplies and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its place of business and to said jobsites in interstate commerce directly from states of the United States other than the states in which said place of business and jobsites are located.

(d) Austin is, and has been at all times material herein, a person engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(1), (6) and (7) and 8(b)(4) of the Act.

4. (a) Hudik-Ross Co., Inc., herein called Hudik-Ross, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Hudik-Ross has maintained its principal office and place of business at 251 West 42nd Street, in the City of New York, State of New York. It is, and has been at all times material herein, engaged in the business of providing and performing heat, ventilation and air-conditioning contracting services and related services at various building and construction jobsites in the State of New York.

(c) During the past year, which period is representative of its annual operations generally, Hudik-Ross, in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business, and to various building and construction jobsites in New York State, heating, ventilating and air conditioning supplies, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to said place of business and to said jobsites in interstate commerce directly from states of the United States other than the state in which said place of business and jobsites are located.

(d) Hudick-Ross is, and has been at all times material herein, a person engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(1), (6) and (7) and 8(b)(4) of the Act.

5. Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6. William Daley is, and has been at all times material herein, the business agent of Respondent, acting on its behalf, and as agent thereof.

7. (a) At all times material herein, Austin has been the engineer and general contractor for the construction of the Norwegian Home for the Aged located at 1250 67th Street, Brooklyn, New York, herein called the Norwegian Home jobsite.

(b) At all times material herein, Austin, in its capacity of engineer, prepared the engineering job specifications for the construction of the Norwegian Home. The said job specifications, prepared by Austin, require the installation of heating and air-conditioning units at the Norwegian Home jobsite known as climate command units, which units are manufactured by Slant/Fin. Said job specifications further require that the main water flow and condensate assembly for the above mentioned units shall be factory installed as an integral part of said units manufactured by Slant/Fin.

(c) Pursuant to an agreement with Slant/Fin, and in accordance with the Norwegian Home job specifications described in subparagraph (b) above, Austin has, at all times material herein, purchased from Slant/Fin and caused to be delivered to the Norwegian Home jobsite, climate command heating and air-conditioning units to be installed at said Norwegian Home jobsite.

8. In or around April 1972, Austin subcontracted to Hudik-Ross the heating, ventilation and air-conditioning work to be performed at the Norwegian Home jobsite, including the installation of the climate command heating and air-conditioning units with factory installed main water flow and condensate assemblies, manufactured by Slant/Fin.

9. At all times material herein, Hudik-Ross and Respondent have been parties to a collective bargaining agreement covering employees of Hudik-Ross and Hudik-Ross has employed individuals at its various building and construction jobsites, including the Norwegian Home

jobsite, who are members of, or are represented by, Respondent.

10. At no time material herein have Slant/Fin and Respondent been parties to a collective bargaining agreement and the employees of Slant/Fin are not members of, or represented by, Respondent.

11. At all times material herein, Respondent has been engaged in a labor dispute with Slant/Fin because Slant/Fin is not a party to a collective bargaining agreement with Respondent and does not employ individuals who are members of, or represented by, Respondent, and because the main water flow and condensate assemblies for the command control heating and air-conditioning units manufactured by Slant/Fin for Austin, to be installed at the Norwegian Home jobsite, have been factory installed by employees of Slant/Fin who are not members of, or represented by, Respondent, and have not been installed at said jobsite by employees of Hudik-Ross, who are members of, or represented by, Respondent.

12. (a) On or about June 22, 1972, and on various other dates presently unknown during the months of July, August and September 1972, Respondent, by William Daley, its business agent at the Norwegian Home jobsite, in furtherance of its dispute with Slant/Fin, as described above in paragraph 11, threatened Austin that it would refuse to permit its members employed by Hudik-Ross at the Norwegian Home jobsite, to handle, work on or install the climate command heating and air-conditioning units manufactured by Slant/Fin and scheduled to be installed at the Norwegian Home jobsite.

(b) On or about September 21, 1972, and on various other dates presently unknown during the months of September and October 1972, Respondent, by William Daley, its business agent, in furtherance of its dispute with Slant/Fin, as described above in paragraph 11, threatened Hudik-Ross that it would refuse to permit its members employed by Hudik-Ross at the Norwegian Home jobsite, to handle, work on or install the climate command heating and air conditioning units manufactured by Slant/Fin and scheduled to be installed at the Norwegian Home jobsite.

13. Since on or about September 15, 1972, Respondent, in furtherance of its dispute with Slant/Fin as described above in paragraph 11, has engaged in a strike among individuals employed by Hudik-Ross at the Norwegian Home jobsite, and has caused such individuals employed by Hudik-Ross at the Norwegian Home jobsite to refuse to work on, install, or otherwise handle the climate command heating and air-conditioning units manufactured by Slant/Fin and scheduled to be installed at the Norwegian Home jobsite.

14. Since on or about September 15, 1972, Respondent has engaged in a strike, as described above in paragraph 13, and by such conduct and by other means including requests, appeals, orders and instructions, Respondent induced and encouraged individuals employed by Hudik-Ross, and other persons engaged in commerce and in industries affecting commerce, to engage in a strike and a refusal in the course of their employment to use, manufacture, process, transport and otherwise handle and work on goods, articles, materials and commodities, and to perform services for their respective employers.

15. By the conduct described above in paragraphs 12, 13 and 14, Respondent threatened, coerced and restrained Hudik-Ross, Austin, and other persons engaged in commerce and in industries affecting commerce.

16. Respondent engaged in the conduct described above in paragraphs 12 through 15, in furtherance of its dispute with Slant/Fin, as described above in paragraph 11, and with an object or objects: (a) to force and require Hudik-Ross, and other persons, to cease using, handling, transporting, and otherwise dealing in climate command heating and air-conditioning units with factory installed main water flow and condensate assemblies or other related units or products manufactured by Slant/Fin, notwithstanding that Hudik-Ross was required to install said climate command heating and air-conditioning units at the Norwegian Home jobsite pursuant to the terms of its contract with Austin, as described above in paragraph 8; (b) to force and require Hudik-Ross and other persons, to cease doing business with Austin, Slant/Fin and other persons; and (c) to force and require Austin and

other persons to cease using, handling, transporting or otherwise dealing in the products of Slant/Fin, and other producers or manufacturers, and to cease doing business with Slant/Fin and other persons.

17. By the acts described above in paragraphs 12 through 15, and by each of said acts, for the objects described above in paragraph 16, Respondent engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

18. The acts of Respondent described above in paragraphs 12 through 16, occurring in connection with the operations of Slant/Fin, Austin and Hudik-Ross, described above in paragraphs 2, 3 and 4, respectively, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lend to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 8th day of November, 1972 at 11:00 a.m. at 16 Court Street, fourth floor, in the Borough of Brooklyn, City and State of New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures In Formal Hearings Held Before The National Labor Relations Board In Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the Natioinal Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board.

Dated at Brooklyn, New York, this 26th day of October, 1972.

/s/ Samuel M. Kaynard
SAMUEL M. KAYNARD
Regional Director, Region 29
National Labor Relations Board
16 Court Street, Brooklyn, New York 11241

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 29-CC-336

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

and

THE AUSTIN COMPANY, INC.

ANSWER

ENTERPRISE ASSOCIATION, etc., the Respondent herein, answers the Complaint in the within case as follows:

1. Admits the allegations contained in paragraphs 1, 2(a), 2(b), 2(c), 2(d), 3(a), 3(b), 3(c), 3(d), 4(a), 4(b), 4(c), 4(d), 5, 6, 7(a), 9 and 10 of the Complaint.

2. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7(b), 7(c) and 8 of the Complaint.

3. Denies the allegations contained in paragraphs 11, 12(a), 12(b), 13, 14, 15, 16, 17 and 18 of the Complaint.

Dated: New York, N. Y.
November 9, 1972.

DELSON & GORDON
By /s/ Ernest Fleischman
ERNEST FLEISCHMAN
Attorneys for Respondent Union
230 Park Avenue
New York, N. Y. 10017

TO:

Samuel M. Kaynard, Esq.
Regional Director
Region 29
National Labor Relations Board
16 Court Street
Brooklyn, N. Y.

The Austin Company, Inc.
450 West First Avenue
City of Roselle
New Jersev

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Second Region

Case No. 29-CC-336

In the Matter of:

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

AND

THE AUSTIN COMPANY, INC., Charging Party.

16 Court Street
Brooklyn, New York
November 15, 1972

BEFORE:

RAMEY DONOVAN, Administrative Law Judge

Appearances:

HOWARD EDELMAN, ESQ.
Counsel for the General Counsel

DELSON & GORDON, ESQS.
230 Park Avenue
New York, New York
Appearing on behalf of the Respondent

BY: ERNEST FLEISCHMAN, ESQ., of Counsel

[3] PROCEEDINGS

JUDGE DONOVAN: The hearing will be in order.

This is a formal hearing in the matter of the Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and vicinity, Local Union Number 638 of the United Association of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, and the Austin Company, Inc., Case No. 29-CC-0336.

* * * *

Mr. Edelman, you may proceed.

MR. EDELMAN: Your Honor, this matter was tried in a 10L proceeding before Judge Bruchhausen on November 2, 1972.

The facts brought out in the trial of that case [4] would be the facts that would be brought out in the trial of this complaint.

There were no issues of credibility with respect to the 10L proceeding, and there are no issues of credibility with respect to this case.

The facts really are not in dispute.

That being the case, your Honor, General Counsel would like to propose that the record in the 10L proceeding constitute the record in this proceeding, and that would include—well, the record is from page 1 to page 142.

The particular case is Kaynard versus Enterprise, Local 638, 72 Civil 1339.

The exhibits in connection with that case would be part of the record.

Those exhibits would be Petitioner's Exhibits 1 through 11 and Respondent's Exhibit B.

* * * *

[7] JUDGE DONOVAN: Now, Mr. Fleischman, do you join in the proposed stipulation of Mr. Edelman with respect to Exhibit 2, the transcript in the District Court proceeding as constituting the record in this case?

MR. FLEISCHMAN: I do.

JUDGE DONOVAN: All right.

I'll receive General Counsel's Exhibit 2 into evidence, which includes the transcript of testimony and the exhibits referred to therein.

(Document referred to marked General Counsel's Exhibit 2 in evidence.)

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72-C-1339

SAMUEL KAYNARD, REGIONAL DIRECTOR OF REGION 29 OF THE NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, PETITIONER,

—against—

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, RESPONDENT.

United States Courthouse
Brooklyn, New York

November 2, 1972
10:30 o'clock A.M.

Before:

HONORABLE WALTER BRUCHHAUSEN,
U.S.D.J.

EMANUEL KARR
Official Court Reporter

[2] Appearances:

NATIONAL LABOR RELATIONS BOARD,
Attorney for Petitioner

BY: HOWARD EDELMAN, ESQ., of Counsel.

MESSRS. DELSON & GORDON,
Attorneys for Local 638

BY: ERNEST FLEISHMAN, ESQ., of Counsel.

* * * *

[26] MR. EDELMAN: Your Honor, the petitioner will call as its first witness Robert Grand.

ROBERT S. GRAND, called as a witness on behalf of the petitioner, having been duly sworn by His Honor, Judge Bruchhausen, testified as follows:

Direct examination by Mr. Edelman:

Q Mr. Grand, are you employed by The Austin Company?
A Yes I am.
Q What is your position?
A District superintendent.
Q How long have you been employed by Austin?
A Going on thirty-nine years.
Q How long have you held the position of District superintendent?
A Going on twenty-eight years.
Q Will you describe for us your job, which would include the duties that you carry out.
[27] A Yes.

I plan the project, I schedule the project, I assign the Austin key personnel to the project, I remove them from the project at the proper times; I visit the project on a regular basis, discussing with the superintendent regarding the problems that come up regarding the progress of the work, I conduct and arrange for meetings between Austin personnel and subcontractors on the project in order to tie in the work of the various people.

THE COURT: Let me just come back a ways.

What position is Austin in, what do they do?

MR. EDELMAN: They are the general contractors, they are building it and they are also the engineer, they design it.

THE COURT: I see.

A (continuing) And finally I see to it that the job is properly completed and turned over to the union.

Q In your capacity as district manager or district superintendent, do you supervise more than one project at a time?

A Yes I do.

Q Have you been supervising, among other projects, the construction of the Norwegian Home?

A Yes.

* * * *

[28] Q In connection with the Norwegian Home job, can you describe in general the duties of The Austin Company in connection with its capacity as general contractor of the job.

A The duties of The Austin Company are actually passed on through me as the head of construction, with duties similar to what I have stated, plus the preparation of the drawings and the specifications which are put out for bids.

Q Well, let me ask you, what does Austin actually do in connection with the job, do they contact any of the operations on the job itself?

A Yes. We bill the complete project, and as such we ourselves are employers of labor, carpenters, bricklayers, cement finishers, ironworkers and operating engineers. We sub-contract electrical and mechanical trades, the mechanical trades including plumbing, the sprinkler work, the heat, ventilation and air conditioning. We also sublet specialties such as the asbestos tile flooring, ceiling work, carpeting and various things similar to that.

Q You have already indicated that Austin has drawn up the plans and specifications for this job.

A Yes.

[29] Q Can you tell me what the plans and specifications for a job include, describe them so that a reader of the record might get a visual picture of them.

A Yes.

The Austin Company is responsible for the design of the complete project. In doing this they prepare drawings and specifications for all of the various subcontractors, plus the specifications necessary for the purchase of material. The drawings are quite elaborate on a project such as this. I haven't counted them, but it could consist of forty or fifty drawings, specifications could consist of two hundred pages of material, the particular specifications for the HVAC—

Q Excuse me, HVAC, what would that mean?

A Heating, ventilation, and air conditioning.

HVAC, for example, is basically a 65 page specification and it does call for supplements to those specifications for items of equipment purchased by others which will be incorporated to the work by the heating, ventilating and air conditioning subcontractor, and those pages might add twenty or so pages to the work in question.

Q With respect to the HVAC specifications, was there a section of those specifications which related specifically to room heating and air conditioning units?

A There is a reference in the basic heating, ventilating [30] and air conditioning specifications which refer to another specification as part of the contract of work to be performed by this contractor, although purchased by others, and there were the specifications covering the Slant/Fin units.

Q In other words, part of the engineering specifications drawn up by Austin covered specifically the Slant/Fin units.

A Yes, sir.

MR. EDELMAN: I would like to have this document marked as petitioner's exhibit 1 for identification.

THE CLERK: Five page document headed, Specification 202 for room heating and air conditioning units for the Norwegian Christian Home Health Facility is marked for identification petitioner's exhibit number one.

So marked.

BY MR. EDELMAN:

Q Mr. Grand, I show you exhibit one for identification and ask you if you have ever seen it before and do you recognize it?

A Yes, I think these are the specifications drawn up by the Austin engineering department for the purchase of these units and for shipment to the heating, ventilation and air- [31] conditioning contractor as part of his work, namely, the installation of these units.

Q In other words, this would cover the type of units to be used on the job and how it is to be installed and the specifications that the units shall cover?

A Yes, sir.

* * * *

THE CLERK: Document marked for identification plaintiff's exhibit one now received in evidence.

BY MR. EDELMAN:

Q Mr. Grand, I would ask you if you were to read aloud the first paragraph in the specifications.

A It reads:

"furnish at the job site Slant/Fin Climate [32] Command Air Conditioners. The unit shall be complete with cabinet, filters, cooling chassis, heating coil, fans, main water flow and condensate assembly, controls, vent door, outdoor air plenun and outdoor air grille."

Q Now, turn to the third page of the exhibit, as part of the specifications which relate to the main water flow and condensate assembly, I would ask you if you would read that section, please.

A The part reads:

"the main water flow and condensate assembly shall be factory installed as an integral part of the unit by the manufacturer. The assembly shall be of copper construction tested to 150 psi leakage. Two shut off valves shall be provided to isolate the cooling chassis from the main line water supply for servicing. An automatic three-way valve shall be incorporated in this assembly to respond to the control panel's demand for cooling or heating. It will be directing water flow either through the water cooled condenser of the cooling chassis or to the hot water coil mounted in the lower part of the cabinet."

THE COURT: Do I take it that not only does the Slant/Fin manufacture but the specifications call for them to install, too: is that it?

MR. EDELMAN: In other words the specifications [33] set forth the particular type of units to be used, the model number, full and in detail, and the specifications further provide that the internal piping of main

water through the condensate assembly shall be piped and connected by employees of Slant/Fin.

THE COURT: I see.

* * * *

[37] Q Is Austin performing the HVAC work on the job?

A The Austin Company has subcontracted the HVAC work—

THE COURT: He is asking whether the company itself, I think counsel is not asking at the moment about the subcontractor.

A The Austin Company is not performing the work of the subcontractor.

[38] Q Was this work subcontracted?

A Yes it was.

Q And to whom was it subcontracted?

A To the Hudik-Ross Company, Inc.

Q Was there a written subcontract executed between Austin and Hudik-Ross?

A Yes, there was.

Q Were employees of Hudik-Ross members of this Union?

A Yes, as I understand it.

MR. EDELMAN: I would like to have this document marked as Petitioner's Exhibit 2.

THE CLERK: Six-page document headed the Austin Company, Lump Sum Sub-Contract, marked for identification as Plaintiff's Exhibit 2.

MR. EDELMAN: Is it correct that Hudik-Ross employees were members of Local 638, Mr. Fleishman?

MR. FLEISHMAN: Yes. That is correct. They were members of Local 638.

* * * *

THE CLERK: Purchase order from the Austin [39] Company dated January 14, 1972, marked for identification as Plaintiff's Exhibit 3.

* * * *

THE CLERK: Two-page letter from Slant/Fin to Mr. Walter Bogucki, dated January 19, 1972, marked for identification as Plaintiff's Exhibit number 4.

* * * *

[40] Q Is it your statement that the three documents that you have, Exhibits 2, 3 and 4, constitute a subcontract between the Austin Company and Hudik-Ross?

A Yes, sir.

* * * *

[42] Q All right.

Mr. Grand, in connection with the sub-contract, was it Hudik's responsibility to purchase the required unit?

A It was not.

Q And who purchased the required units?

A The Austin Company.

* * * *

[43] Q Mr. Grand, I show you Petitioner's Exhibit marked for identification number 5 and ask you if you recognize it?

A I do recognize it but—

Q Can you tell me what that is?

A That this is a change order to the original order, which is attached, and really should be marked as a separate exhibit because that precludes the other one (indicating).

This (indicating), the original purchase order, that is the original purchase order, the other one (indicating) is a change to that purchase order.

Q Would it be fair to say that the second page of the Exhibit is the purchase order?

A That is correct.

Q And that the first page is an amendment to the purchase order?

A Correct.

Q And that the third page is also part of the [44] original purchase order?

* * * *

THE CLERK: Document marked for identification as Plaintiff's Exhibit 5, now received in evidence.

* * * *

Q With respect to the Slant/Fin unit and in connection with the sub-contract between Austin and Hudik, what was Hudik's responsibility concerning the unit?

A Hudik should receive, unload, new to place of installation, install and pipe to it and try it.

Q In other words, connect up the unit so that it was operable?

A Correct.

Q Basically then, would you say its job was one of installation?

A Yes, sir.

Q By the way, how did Hudik come about being awarded the sub-contract?

[45] A By competitive bidding.

MR. EDELMAN: I'd like to have this document marked as Petitioner's Exhibit 6.

THE CLERK: Installation instructions marked for identification as Exhibit number 6.

* * * *

Q Mr. Grand, have you ever seen Petitioner's Exhibit marked for identification 6?

A Yes, I have.

Q Can you tell me what that is?

A It is prepared by Slant/Fin and submitted to the Austin Company giving a general description of the unit, of their units furnished.

Q Is it the Slant/Fin climate command unit?

A Yes, it is.

Q Are those the units that were used on the job?

A Yes.

Q I see.

The accompanying diagram, is that a diagram of the unit used on the job?

A Yes, sir.

Q With all the installation instructions?

A Correct.

[46] Q Would the main water flow and condensate assembly be set forth on that diagram?

A The piping shown, it is not diagramed to say—it does show the gate valves, it does show the couplings, it does show the control.

Q In other words, there are certain pipes—

A The pipes that are visible are the water and condensate connections.

* * * *

THE CLERK: Diagram marked for identification as Petitioner's Exhibit 6, now received in evidence.

* * * *

[47] Q Now, referring to that document, you indicated that there was certain piping that was part of the main water flow and condensate assembly that was represented on the diagram at page 3; is that correct, sir?

A Yes, sir.

MR. EDELMAN: Your Honor, I wonder if we can mark off that piping that represents part of the main work flow and condensate assembly so it may be referred to and be referred to it by myself.

THE COURT: You may do it.

Q Mr. Grand, would you circle the area that represents the main water flow and condensate assembly piping?

* * * *

A All right.

(The witness encircled the point indicated.)

MR. EDELMAN: May the record indicate that the diagram on page 3, the top diagram on page 3 has been circled twice in red ink by Mr. Grand as the areas which indicate the piping which is a part of the main water flow and [48] condensate assembly.

* * * *

Q I say did there come a time when the Slant/Fin units were delivered to the Norwegian job site?

A Yes, sir.

Q And when did that take place, on or about?

[49] A On or about the middle of June.

Q That would be 1972, I assume?

A 1972.

Q What was the purpose of these units?

A These units provided the heating and cooling of a majority of the rooms in the building, the rooms occupied or to be occupied by the residents of the building.

Q Is there a unit in each room?

A There is a unit in each of the rooms that I described.

* * * *

[50] Q In connection with the Norwegian job site, does Austin employ members of the steamfitting trade?

A No, we do not.

Q Does Austin have any contact with Local 638 or any other steamfitting labor organization?

A The Austin Company does have a national agreement with UAS, of which Local 638 is a part, but this is not for this type of work.

Q What type of work is it for?

A It is mainly process installation.

Q What is process installation?

A Process as differs from comfort, heating of a building, cooling of a building is all part of comfort work; processing involves machinery and equipment feeding any kind of gases, water, steam or anything else.

Q Was there any contract with Local 638 to perform any of the work, did Austin have a contract with Local 638 to perform any work on the Norweigan job?

A We had no contract with Local 638.

* * * *

[52] CROSS EXAMINATION

BY MR. FLEISHMAN:

Q When Hudik-Ross bid on this job, the specifications were made available to Hudik-Ross?

A Yes, sir.

Q And the specifications called for Slant/Fin units?

A Yes, sir.

Q So Hudik-Ross knew that as part of the heating maintenance and air conditioning work, if the contract was awarded to it, it would have to install Slant/Fin climate control units?

A Yes, sir.

Q And this matter of the Slant/Fin unit wasn't brought to Hudik-Ross' attention after the contract was awarded to it; am I correct?

They knew about it before they got the job that this was part of the work they were going to do?

[53] A Yes, sir.

Q Now they also had the specifications given to them which related to the Slant/Fin units?

A Yes, sir.

Q And are these (indicating) the specifications?

I show you Plaintiff's Exhibit number 1.

A These are the specifications covering the Slant/Fin units.

Q And these specifications were drawn by Austin?

A Austin Engineering.

Q Now, in the specifications there are certain words, sentences, which are underlined.

Were they in the original specifications?

A They were not.

Q They were not?

A The underlining, the words were in the specifications, the underlining was not.

* * * *

[54] Q Now I call your attention to page 201-3 of Petitioner's Exhibit 1 in evidence and ask you, does that relate to the work in dispute at this time?

A Would you repeat that, what part of it are you asking me about?

Q The parts that are underlined.

A It does relate to the dispute in question as it has been shown to me.

THE COURT: This was Exhibit 1?

MR. FLEISHMAN: That is correct, page 201-3.

Q And that states that this work is to be factory installed?

A Correct.

* * * *

[55] Q This was part of the specifications on which Hudik-Ross bid on this particular job?

A Yes.

Q And the job was awarded to Hudik-Ross in January 1972?

A Correct.

* * * *

[58] Q Mr. Grand, I show you Respondent's A for identification, and in general terms what would you call it?

[59] A A bulletin put out by Slant/Fin showing their climate command self-contained heating and cooling unit.

* * * *

[60] Q I ask you to turn to page 3 of Respondent's Exhibit A for identification and to turn to page 3 of Petitioner's Exhibit 6 in evidence and compare the two and tell me whether they refer to the same unit.

A They don't appear to me to talk about the same unit.

Q Will you read me the numbers of the models as set forth in Petitioner's Exhibit 6?

A The WC6, WC9, WC12 and WC16.

* * * *

Q Mr. Grand, I ask you to look at Petitioner's—Respondent's Exhibit A, on page 3, and they have the model numbers there.

Can you read the model numbers which this brochure [61] covers?

A The model numbers are WC6. WC9, WC12 and WC16.

Q And those are exactly the same numbers that appear on Petitioner's Exhibit 6?

A That is correct.

* * * *

Q Mr. Grand, I ask you to look at page 4 of Respondent's Exhibit for identification and read it, Respondent's Exhibit A, and read the last paragraph on that page.

A It reads:

"Monoflo tees by-pass and three-way valves shown are an integral part of each unit and are factory-installed within the cabinet."

Q Did you leave out a word there?

A I don't believe so.

Q What is the first word in that paragraph?

A "Note."

Q I don't think you read that.
A Well—
Q Now, this was called to the attention of people, wasn't it, wasn't it, this is something special?
A Yes.

* * * *

[63] MR. EDELMAN: Your Honor, I am going to object to this whole line of questioning, there is nothing in the complaint that specifies, and [64] as a matter of fact we concede that the steamfitters have performed other work in connection with their subcontract except the work related to the Slant/Fin units.

* * * *

Q Let us clarify this one point.
The Austin Company has a contract with the International Union?
A Yes, sir.
Q But it doesn't cover this type of work?
A No, sir.
Q So that in effect the Austin Company has no collective bargaining agreement with this or any other steamfitting union covering this type of heating, ventilating and [65] air conditioning?
A Correct.

* * * *

Q Directing your attention to Petitioner's Exhibit 1, page 3, and the paragraph referring to the main water flow and condensate assembly which has been underlined, you say the original specifications did not contain that underlining; is that correct?
A Correct.
Q Other than that, that is an exact photocopy of the original specifications?
A Yes, sir.
Q Do you know who underlined that particular section?
A I did.

* * * *

[66] Q And in what connection did you underline it?
A In connection with this dispute now.

* * * *

Q In other words, to point out the places that are in dispute.

* * * *

[72] PETER PLATH, called as a witness, having been first duly sworn by the Clerk of Court, testified as follows:

DIRECT EXAMINATION

BY MR. EDELMAN:

Q Mr. Plath, are you current employed?
A Yes.
Q And your employer's name?
A The Austin Company.
Q How long have you been employed by Austin?
A Since 1959 with the exception of two years in the army.
Q What is your present position with Austin?
A Project superintendent.
Q Are you connected with the Norwegian job?
A Yes.

* * * *

Q What is your position in connection with this job?
A Project superintendent.
[73] Q Have you been project superintendent from the inception of this project?
A Yes.
Q When was that?
A Late September in 1971.
Q Can you describe for us your duties as a project superintendent in this job?
A To direct Austin employees on the job, coordinate activity of sub-contractors and assure that the job is done according to plans and specifications.
Q In connection with your authority and duties, do you have authority to hire and fire employees if need be?
A Yes.
Q Are you a member of Local 638?
A No.
Q Are you a member of any labor organization?
A No.

Q Did there come a time in connection with your job as the superintendent of the job when the Slant/Fin units arrived at the job site?

A Yes.

Q When did this take place?

A They came in two shipments, one on the 14th of June, '72, and the second shipment was on the 21st of June, '72.

[74] Q How many units in total were on both shipments?

A In total it was 114.

Q Individual units?

A Yes.

Q Identical units?

A Not identical. I believe there are three or four different types.

Q Did they all contain the same prepiped water main flow and condensate assembly?

A Yes.

Q I direct your attention to the latter part of June, say the last week in June, and I ask you if you can recall having a conversation during this period with a Mr. William Daly.

A Yes.

Q Can you tell me who Mr. William Daly is?

A The business agent of the Steamfitters local in New York City.

Q Have you ever had any dealings with Mr. Daly before this conversation?

A No. I had met him before, but that was it.

Q Were you informed that he was a representative or an agent or delegate of Local 638 on those occasions?

[75] A Yes.

* * * *

Q You indicated that you had a conversation with Mr. Daly.

Can you tell me where the conversation took place?

A On the job site outside of the building.

Q As closely as you can, when did this conversation take place?

A The 22nd of June.

Q On or about the 22nd of June?

A Yes.

Q Morning or afternoon?

A Shortly before noontime.

Q Can you describe the conversation that took place?

[76] A He stated that his men would not install the Slant/Fin units as the piping inside those units was steamfitter's work.

Q Do you know George Zimmerman?

A Steamfitter foreman for Hudik-Ross.

* * * *

Q Do you have any—do you know whether he is a member of any labor organization?

A I believe he is a member of the Steamfitters Union of New York City.

Q Would that be Local 638?

A Yes.

Q You said he is employed by Hudik-Ross?

A Yes.

Q Is he on the job site, the Norwegian Home?

A Yes.

Q Does he work there every day?

A Yes.

Q In connection with the Slant/Fin units, do you recall having any conversations at any time with [77] Mr. Zimmerman?

A Yes.

Q Was it one conversation or more?

A It was almost on a regular basis.

Q When you say "regular basis," how regular, daily, weekly, monthly?

A At times daily, at other times twice a week, other times weekly.

Q Over what period of time did you have these conversations?

A In about the end of June to the present time, with the exception of the period while they were on strike, which was between the first week of July to August 7th.

Q Were these conversations that you had with Mr. Zimmerman concerning the Slant/Fin units, were they similar conversations or did they widely differ?

A No, they were always the same.

Q Well, tell me as best you can, what the sum and substance of these conversations were?

A I would ask the question when are you going to start hooking up the Slant/Fin units, and the answer in general would be, I haven't got the go ahead from the unit.

* * * *

[78] Q As project engineer, would you know when the unit should have been installed?

A As project superintendent.

Q I'm sorry, project superintendent.

A The original schedule called for installation to start the first week in July and run over a period of five to six weeks.

The fact that they did go on strike on the 1st of July, they came back to work on August 7th. At that time they should have started installing the Slant/Fin units.

Q Had there been no strike, the installation should have taken place in July?

A Exactly.

Q But the strike intervened?

A Yes.

Q But was concluded in August?

A Right.

Q And you claim thereafter the installation should have taken place?

A Yes.

* * * *

[79] Q Mr. Plath, I show you Petitioner's Exhibit marked No. 7 for Identification, and ask you if you ever have seen that before.

A Yes.

Q Can you tell us what it is?

A It's a schedule which indicates the progress of the various major items on the job.

Q Who prepared it?

A I did.

Q Is there any reference on this schedule to Hudik-Ross in connection with the Slant/Fin unit?

A Yes. On the second page under H.V.A.C., the item marked "Permimeter radiation and fin units."

Q That would be abbreviated "Per. rad. & fin units"?

A Right.

* * * *

[80] Q Bearing in mind that the strike ended on August 7th, when then should, based on this chart, when then should the work have begun and when should the work have been concluded?

A It should have started on the 7th of August and continued for six weeks, which would bring us to the last of the week of September 11th.

Q By the middle of September, the work would have been concluded?

A That's right.

* * * *

[82] Q Mr. Plath, I show you Petitioner's Exhibit marked for identification No. 8, and ask you if you have ever seen that before?

A Yes.

Q Will you tell us what it is?

A It is the minutes of the meeting held on the 29th of June, '72.

Q Did you prepare those meeting minutes?

A Yes.

* * * *

Q Is there any reference to the Slant/Fin units in those minutes?

A Yes, on the third page, paragraph B.

Q Would you read that?

A "Slant/Fin units 114, by Austin. On-job hookup of same being handled by F. Hudik. Steamfitters Union [83] states they will not hook up same as they are pre-assembled."

Q On what—how did that statement come to be in the minutes—

MR. FLEICHMAN: I object. But anyway, I will stipulate that that was so.

* * * *

[88] FRANK HUDIK, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. EDELMAN:

Q Mr. Hudik, are you connected with the corporation, Hudik-Ross?

A Yes, I am.

Q What is your connection with that corporation?

A I am the president of that corporation.

Q What type of corporation is Hudik-Ross?

A Mechanical contracting company that does heating, ventilating and air-conditioning work.

Q Are you in any way connected with the Norwegian Home for the Aged job?

A Yes.

Q And what is your connection?

A We are performing the mechanical contracting work such as heating, ventilating and air-condition.

Q Is that under a sub-contract?

A Yes, with The Austin Company.

Q I show you Petitioner's Exhibits 2, 3 and 4, and ask you if you will look at them and tell me if you ever have seen those before and if you have, tell me what [89] they are.

A Sub-contract for the particular job known as the Norwegian Christian Home for the Aged.

* * * *

Q How did you become to be awarded this sub-contract?

A We bid for the job and we were the low bidder.

[90] Q As part of your sub-contract with Austin, were you required to install Slant/Fin climate control units?

A Yes, we were.

Q In connection with this unit, what was the sum and substance of the work you were required to perform?

A There were plans and specifications stipulated for the job. The specifications stipulated that we were to receive and install the Slant/Fin units in the building.

Q You are talking about the—is this your sub-contract which required this?

A With The Austin Company, yes, to receive and install these units.

Q Were there also specifications, job specifications, in connection with your work as H.V.A.C. contractor?

A Yes.

Q Did these job specifications also relate to the Slant/Fin unit?

A Yes.

Q Did you look at the job specifications in this connection?

[91] A When we did the job?

Q At any time.

A Yes.

Q And did the job specifications require Slant/Fin units?

A The job specifications stipulated that somebody else, The Austin Company, would furnish the units, the Slant/Fin units to us for installation by us.

The specification so stipulated.

Q Do you recall the specification stipulating anything concerning the main water flow and condensator?

A The specifications stipulated that the main water flow and assembly was to be fabricated, installed and pretested at the factory.

Q Did you have any authority to substitute any other unit to replace the Slant/Fin unit?

A No.

Q Did you have authority to alter in any way the job specifications for this job?

A No.

Q Did you have authority to take apart and reassemble the main water flow and condensate assembly in the field?

A No.

[92] Q I show you Petitioner's Exhibit 6, a diagram of the Slant/Fin unit, and I ask you if you can identify

on that diagram on page 3, the visible parts of the main water flow and condensate assembly.

A Basically as outlined in red with the addition of a line running through the unit from the left-hand side of the illustration to the right-hand side of the illustration.

Q Using again this diagram, as a guide, what would be your job in connection with the installation of this unit?

A To connect to an inlet on one side of the unit exterior to the casing and connect to the opposite side of the unit, exterior, to the casing.

Q Would it be a fair description to say that in the room the unit was to be installed with two pipes, approximately in a space between the two pipes the width of the unit and these pipes were to be connected to the unit?

A That's correct.

Q Can you mark on that diagram where the pipes would be connected?

A Well, the other one because of the isometrics here.

MR. EDELMAN: Let the record show the [93] witness has indicated his answer by a black "X" on the diagram.

Q Do you have a regular complement of employees?

A Yes.

Q About how many in your complement?

A Are you referring specifically to steamfitters?

Q I am referring specifically to steamfitters.

A Anywhere between 10 and 20 steamfitters.

Q And that would depend on the number of jobs under construction?

A That's correct.

Q The size of the job?

A That's right.

Q These steamfitters you have in your employ, are they represented by any labor organization?

A Yes.

Q And that labor organization is what?

A Local 638.

Q Do you have a collective bargaining agreement with Local 638?

A Yes, we do.

Q Is there a present collective bargaining agreement with Local 638?

A Yes.

* * * *

[94] Q Have you had a prior series of agreements of collective bargaining with Local 638?

A Yes.

Q Mr. Hudik, I show you Petitioner's Exhibit, marked for identification, Nos. 9 and 10, and ask you to look at them, and I ask you if you have seen them before and if you have, tell me exactly what they are.

A Exhibit No. 9 is the working agreement, a working [95] agreement that we had with the Enterprises Association, Local Union 638. It is dated '66 and then '69. '69 terminates.

Exhibit No. 10 is an interim agreement which we signed with the Local 638 to allow us to work during a period of June 30, 1972, to June 30, 1973.

Q Would the '66—'69 agreement, is that incorporated and part of your present agreement?

A Yes.

Q The addendum just modifies the working agreement to bring up the wage schedules and other amendments to date?

A Yes.

Q You had a similar amendment to the agreement which expired in 1972?

A Yes.

Q And when did the agreement expire in 1972?

A In June.

Q Of 1972?

A Yes.

Q I direct your attention to the working agreement, specifically directing your attention to Rule 9 of the working agreement, and I ask you to look it over.

A Yes, I am familiar with it.

[96] Q Is Rule 9, as it is contained in this exhibit, in your present contract?

A Specifically?

Q Yes.

A I don't know how to answer the question.

We don't get an additional contract, we get just amendments and the amendments specifically spell out just the changes in the contract.

Q Has the amendment changed Rule 9?
A No, it has not.
Q Did the prior amendment change Rule 9?
A No, it has not.

* * * *

Q Did there come a time when the Slant/Fin units arrived on the job site?
A Yes.
Q Do you recall approximately when they arrived?
A I thought they arrived in August but I was corrected [97] and I know they arrived in June.
Q Of 1972?
A Yes, 1972.

* * * *

Q Who is Arthur Chersin?
A Arthur Chersin is an employee of ours.
Q What is his position?
A Project engineer.
Q And what was the conversation—
A An estimator.

* * * *

Q I direct your attention to September 15th on or about that time and ask if you had knowledge whether the Slant/Fin units had been installed as of that date?
A They had not been installed as of that date.
[98] Q And should they have been installed as of that date?
A They should have been started. The installation of the Slant/Fin units should have been started in accordance with the progress of the job.

* * * *

[100] Q Mr. Hudik, * * * I direct your attention to September 22nd, on or about that date, and ask if you recall having a conversation with Mr. Daley at that time?
A Yes, I do.
Q Where did the conversation take place?
A It took place in a restaurant in New York.

Q What was the name of the restaurant?
A Downey's.
Q Can you tell us what the conversation was?
A Mr. Daly and I were discussing the job and Mr. Daly said that we were in violation of the contract, the units received on the job were in violation of the contract, [101] and that he could not allow us to install the units as they existed on the job.

I told him that this was part and parcel of the plans and specifications, and I had no choice in the matter, but he insisted that we were in violation of Article 9, and that he could not allow us to proceed.

Q Have the units been installed to date?
A No.

* * * *

CROSS-EXAMINATION

BY MR. FLEICHMAN:

* * * *

Q Were you the individual, Mr. Hudik, who checked the plans and specifications on this job, prior to bidding on the same?
A No.
Q Who did the estimating for you?
A Chersin.
Q Mr. Chersin?
A Yes.

* * * *

[102] Q Did you bid the job personally?
A No.
Q You weren't in charge of the bidding?
A That is a broad question.
Q Did you know what the job called for in the way of heating, ventilation and air-conditioning?
A When we bid the job?
Q Yes.
A No.
Q When did you first find out about that you had bid on the job?
A Just after the job was bid and we were told that were [sic] were in the running.

Q Did you inquire as to what was called for in the way of heating, ventilating and air-conditioning work?
A When?
Q At anytime prior to the awarding of the job to you.
A No.
Q And who was in charge of that?
A Mr. Chersin.

* * * *

[104] Q Did you know whether there was any work to be done there by the manufacturer at this factory rather than at the job site, that is, piping, branch piping, convectors, condensate assemblies, etc.?
A At what time are you asking me this?
Q Shortly after you obtained the contract.
[105] A I did know.
Q You did know?
A Of course I did.
Q But Mr. Chersin had read the specifications before the contract was awarded to your company?
A I can't tell you what Mr. Chersin did.
Q Who signed the bid letter?
A I don't recall.
Q How many men are in the administrative end of your business?
A About 10.
Q And who signs the bid letters, usually?
A Usually the estimator signs the bid letters.
Q And he is authorized to do that?
A Yes.
Q And in accordance with the practice in your business, the estimator reads the plans and specifications and calculates how much he can do the job for, and then signs the bid letter; is that correct?
A Yes.
Q And in this particular job, Mr. Chersin did the estimating?
A That's correct.

* * * *

[108] Q You had had collective bargaining agreements with Local 638 for many, many years?
A Yes.

* * * *

Q I show you Respondent's Exhibit B for Identification and ask you whether that is your signature.
[109] A Yes, it is.
Q And this contract covers the period '69 through June 30th, I think, of 1972?
A June 30, '69 to '72, oh, yes. Right.

* * * *

Q This agreement, that is the one which is Respondent's Exhibit B in Evidence, incorporates by reference, does it not, Rule 9 which appeared in the 1966-69 agreement, Petitioner's Exhibit 9?
A Yes.
Q Petitioner's Exhibit 10, which is the interim agreement, effective July 1, 1972, contains or incorporates all of the provisions of the old Rule 9, plus a few other relating to identification of work done in the shop?
[110] A That's correct.
Q So that from at least 1966 until the present time, Rule 9, as originally set forth, has continued?
A That's correct.
Q And when you met with Mr. Daly on September 22nd, he told you that your company was violating Rule 9 of the agreement?
A That's correct.

* * * *

[111] Q Your estimator has the authority to sign bid letters?
A Yes.

* * * *

[115] GEORGE ZIMMERMAN, called as a witness, having been sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. EDELMAN:

Q Are you currently employed?
A Yes.
Q Who is your employer?
A Hudik-Ross.
Q How long have you been employed by Hudik-Ross?
A About 13 years.
Q What is your present capacity with Hudik-Ross?
A The man in charge of the job of the Norwegian Home.
Q Would that be a job foreman?
A Similar. We don't specify foreman.
Q Have you been on the Norwegian Home job site [116] since Hudik began working on it?
A Yes.
Q Presently working on this job site?
A Yes.
Q Are you a member of Local 638?
A Yes.
Q How long have you been a member?
A Twenty-two years.
Q Is there a shop steward on the Norwegian job site?
A Yes.
Q Is he a regular employee of Hudik-Ross?
A Yes.
Q Is he there every day?
A Yes.
Q What is his name?
A George Zimmerman.
Q You are the shop steward?
A Yes, I am.
Q I assume then, well, why don't you state your functions in connection with your capacity as a shop steward?

A Represent the union as far as our working agreement goes.
[117] Q If a problem arises at the job site, do you get in touch with the union?
A I notify the business agent.
Q Who would that be?
A Bill Daly.
Q Do you recall the time coming when the Slant/Fin units arrived on the job site?
A Yes.
Q Did you unload them or take part in the unloading?
A Yes, I did.
Q Had you connected them as yet?
A No.
Q Can you tell why you have not connected them?
A Well, the piping to me was in violation of our contract.
Q That is why you didn't connect them?
A Yes.
Q Did you tell any representative of Austin or Hudik-Ross that you were not going to connect the units because it was a violation of your contract?
A I notified my business agent first.
Q Mr. Daly?
[118] A Yes.
Q And did you receive any instructions from Mr. Daly?
A To hold off until there was a decision made.
Q A decision made by whom?
A His superior or anyone further on.
Q Did you inform either representatives of Hudik-Ross or Austin as to the union's position?
A After Bill Daly was informed, yes, sir.
Q Who did you inform?
A Pete Plath, the job superintendent, and Art Chersin.
Q You informed these individuals?
A Right.

Q Is it a fact that from time to time they asked you whether or not you would be able to install the units?

A Right, yes.

Q Did you answer them on each occasion?

A I answered them, yes.

Q And what was your answer?

A That I couldn't proceed with it.

Q And did you indicate a reason why?

A Because it is the usual procedure that I had to wait for a decision.

[119] Q Did you ever tell either Mr. Plath or Mr. Chersin that the units were prepiped and that you couldn't install them for that reason?

A That is what the original thing was.

* * * *

CROSS-EXAMINATION

BY MR. FLEICHMAN:

Q Mr. Zimmerman, how long have you been a steamfitter?

A Twenty-two years.

* * * *

Q How long have you worked for Hudik-Ross?

A Approximately 13 years.

Q And during all of this period, was Hudik-Ross in contractural agreement with Local 638?

A Yes, he was.

Q Now, with respect to the Slant/Fin climate command unit, I show you Respondent's Exhibit A, and ask you to turn to page 3 and state whether this is a fair representation of the unit?

[120] This is the unit of our job.

Q This is the unit?

A Right.

* * * *

[121] Q Are there any other units on the market similar to these?

A Yes, there is.

* * * *

[122] Q Have you worked on any of these units?

A I worked on most of them.

Q And can you give me the name of, say, one unit?

A American Standard.

Q American Standard?

A Right.

Q Does it have an air-conditioning unit?

A Yes, it does.

Q Does it have hot water generated in the basement?

A Yes, it does.

Q Does it have a bypass arrangement?

A No.

Q Does it have a condenser?

A No.

Q Does it have a fan?

A Yes.

Q Now, the piping in that unit that is for the connecting of various parts, who did that work?

A It was prefabricated on the job.

Q And what was done by Local 638 men on the job?

A All pipings to the stubs which is the final connection [123] on the unit.

Q Was this done while you were employed by Hudik-Ross?

A Yes.

* * * *

Q I show you Petitioner's Exhibit 9 which is [124] the 1966-69 contract and call your attention to Rule 9. First of all, what is the title of that rule?

A "Cutting pipe and making up fittings."

Q Under what language does the test of cutting and connecting fabricating the water main flow and condensate assemblies come?

A Under the heading "Radiator branches, coil connections shall be cut and threaded by hand on the job, in accordance with Rule 5."

Q And Rule 5 refers to what?

A Two-man trade.

Q So that can you state whether or not this rule, as you read it, has been applied consistently, to the

best of your knowledge, in connection with work of this type?

A On all jobs I have ever been on, it has been applied all the time.

Q As part of your duties, do you have to work in accordance with plans and specifications?

A Yes, I do.

Q And did you have—and this applied also to this particular job?

A Yes.

Q And were you able to—did you also have [125] copies or a copy of Respondent's Exhibit A?

A Yes.

Q And did you have any other material relating to Slant/Fin units?

A Yes, the complete breakdown of the unit.

Q When the units were delivered, did you do anything with respect to the units?

A Yes. I distributed them on the job and started mounting.

Q Did you examine what was behind the faceplate?

A Yes, I did.

Q How did you do that?

A Taking the front cover off.

Q And then you saw the parts which you claim came within Rule 9?

A Right.

Q What was the time juxtaposition or relationship between when you took the cover off and saw what was there, and you called Mr. Daly?

A The next day, that night. I couldn't say exactly when. It was within the period of time that I unloaded them.

* * * *

[129] WILLIAM J. DALY, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. FLEICHMAN:

Q Are you associated with Local 638?

A Yes.

Q How long have you been a member of Local 638?

A Thirty-four years, excluding time in service, five years in service.

Q Were you ever a working steamfitter?

A Yes, I was.

Q How many years?

A Twenty-two or twenty-three years.

Q What is your present position with the union?

A I am a business agent.

Q How many years have you been a business agent?

A Eleven years.

* * * *

[130] Q Was the Norwegian Home for the Aged within your territory?

A Yes, it is.

Q When did you first hear of the dispute in connection with this Slant/Fin unit?

A Well, I had a call from my foreman that a truckload of these units came in and he asked me if I would stop out to look at them.

The following day I was out on the job and there was another truck there. They were unloading. Whether it was the same truck or a new one, I am not sure.

Q When was that?

A The dates I am not too sure of.

Q Was there then a dispute as to certain work to be done—

A Well—

[131] Q (Continuing)—with respect to the unit?

A With respect to the unit, the piping that was on it, I met the superintendent there, Pete there, and I mentioned there was a violation here.

Q What violations were you referring to?

A The violation of Rule 9 of the agreement.

Q And who was the agreement between?
A Between 638 and Hudik-Ross Company.
Q Was the dispute with Hudik-Ross?
A With Hudik-Ross, yes.
Q Did you have occasion to examine the unit?
A Yes, I did.
Q Did you do that in connection or accompanied by Mr. Zimmerman?
A I did.
Q What did you do in connection with the examination of the Slant/Fin unit? What did you see?
A I seen all the internal piping that was hooked up to the coil which is usually done by the steamfitter at the job site over the years I have been around.
Q Were there branches there?
A Branches, correct.
Q Did you inform Hudik-Ross as to whether any provisions of the agreement was being violated?
[132] A Yes, I did.
Q Who did you inform?
A The first one I informed was the superintendent, John Guilfoyle, and after that I informed Frank Hudik himself.
Q What particular portion of the trade agreement did you rely on?
A I relied on Rule 9, that all branch work should be done on the job site.
Q Was this an innovation on the part of Local 638 or was it traditional?
A Well, in the years I have been around, I have seen it happen once before with one of our contractors and it was corrected. That is the only other time I ever ran into it.
Q Otherwise, all other instances, who did the work?
A The steamfitter on the job site did it.

* * * *

[133] FRANK HUDIK, called as a rebuttal witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

* * * *

[135] CROSS-EXAMINATION

BY MR. FLEICHMAN:

* * * *

[136] THE COURT: You may bring out what is the situation with one and what are the specifics as to the other.
Q All right. Let's get down to this:
Did you tell Mr. Daly that Rule 9 did not apply to this unit because of the nature of its construction?
A Yes.
Q Did you say that was so because the work had been pre-assembled in Slant/Fin's factory?
A Yes.
Q That was the reason why you told Mr. Daly [137] that, because it had been pre-assembled in the Slant/Fin factory?
A Pre-assembled and pretested.
Q In the Slant/Fin factory?
A Correct.
Q But you didn't tell him that it wasn't the work of Steamfitters Local 638 because the contract didn't provide for such work?
A Would you give me that again, please?
Q As I understand it, Mr. Daly told you that this particular work was work belonging to the steamfitters, in accordance with Rule 9 of the contract.
A Correct.
Q And your reply to him was, but it had already been done at the factory?
A And pretested.
Q And pretested?
A Correct.
Q And that removed it, did you say, from Rule 9?
A I don't remember whether I said anything like that.
Q That's right, you don't remember that.
All you said is that it had been pre-assembled and pretested?
A That's correct, I think so.

[138] Q And Mr. Daly said but the contract is clear that that—that this type of work has to be done on the job?

A Mr. Daly said that we were in violation of Rule 9.

Q And your only reply to that was that the work had been pre-assembled and pretested at the Slant/Fin factory?

A I believe so. Words to that effect.

* * * *

[139] WILLIAM J. DALY, recalled as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. FLEICHMAN:

Q Mr. Daly, when you had this conversation with Mr. Hudik and you maintained that having the work done in the Slant/Fin factory was a violation of Rule 9, what was Mr. Hudik's reply to that?

A Well, the only thing I can recall is that he did mention it wasn't bought by him, the equipment, and that was the end of it. He did not buy the equipment.

* * * *

What did he say with respect to Rule 9, any violation of Rule 9?

A I don't know whether he agreed or disagreed. The only reason he stated—the only statement that he made to me was the fact that he did not buy this equipment. He didn't say whether it was a violation or wasn't a violation [140] one way or the other.

Q Did Local 638 at any time have a labor dispute with Slant/Fin because Slant/Fin does not or did not have a collective bargaining agreement with Local 638 or employed members of 638?

A To my knowledge, never.

Q Did you ever speak to anybody of Slant/Fin?

A Never did. Definitely not.

Q Did you ever attend any meeting at which a representative of Slant/Fin was present?

A No, I did not.

Q Did you ever tell Mr. Hudik that you wanted a collective bargaining agreement with Slant/Fin or you wanted Slant/Fin to employ members of Local 638?

A Never did.

* * * *

PLAINTIFF'S EXHIBIT 1 ev. 72C1393

SPECIFICATION 201
FOR
ROOM HEATING AND AIR CONDITIONING UNITS
FOR
THE NEW HEALTH RELATED FACILITY
NORWEGIAN CHRISTIAN HOME FOR THE AGED, INC.
BROOKLYN, NEW YORK

THE AUSTIN COMPANY ROSELLE, NEW JERSEY

GENERAL

Furnish at the jobsite *Slant/Fin Climate Command Air Conditioners.* The units shall be *complete* with cabinet, filters, cooling chasis, heating coil, fans, *main water flow and condensate assembly, controls,* vent door, outside air plenum and outdoor air grille.

Each unit must fit in the space allowed and in no case be greater than 9 inches in depth.

Materials, equipment—shall be first quality and in strict accordance with all of the governing codes local and state, laws, regulations, and ordinances including the City of New York Building Code, Underwriters Laboratories, Inc., NFPA, NEMA and Providence Washington Ins., Co.

CAPACITY

Unit capacity shall be as indicated on the schedule on sheet 204 dated 11-20-71 and on the drawings.

CABINET

Cabinet will be constructed of 18 gauge zinc coated cold rolled steel that has been thoroughly degresed and finished in a standard factory

* * * *

FILTER

An expanded aluminum mesh washable filter will be provided with the unit, so located that it can be removed for cleaning without removing the Front Panel.

COOLING CHASSIS

The cooling chassis will be constructed of 18 gauge zinc coated cold rolled steel with a baked prime coat grey finish. This chassis will contain an evaporator coil of aluminum fin and copper tube construction, a capillary tube refrigerant flow control, a fully hermetic reciprocating R-22 compressor, a copper and steel construction tube-in-tube water cooled condenser, an evaporator fan and drain pan assembly, and associated electrical controls.

The condensate drain pan will be constructed of 18 gauge cold rolled steel, protected with a zinc coating, with the water collecting surfaces coated with a non-metallic waterproofing compound.

The evaporator fan motor shall be a two speed, shaded pole, thermally protected motor designed to operate on 115 volt or 208 volt CPS, single-phase, AC electrical service, as required by unit size.

There will be two aluminum forward curved centrifugal blower wheels, one mounted on either end of the fan motor, enclosed in blower housings. The blower wheels shall be statically and dynamically balanced for quiet operation.

The evaporator drain pan, fan motor and blower wheels and housings will be assembled in such a manner as to permit installation and removal as a unit for ease in cleaning the drain pan.

MAIN WATER FLOW AND CONDENSATE ASSEMBLY

The main water flow and condensate assembly shall be factory installed as an integral part of the unit by the manufacturer. The assembly shall be of copper con-

struction tested to 150 psi leakage. Two shut-off-valves shall be provided to isolate the cooling chassis from the main line water supply for servicing. An automatic three-way valve shall be incorporated in this assembly to respond to the control panel's demand for cooling or heating, thereby directing water flow either through the water cooled condenser of the cooling chassis or to the hot water coil mounted in the lower part of the cabinet. The hot water coil shall be of copper tube and aluminum fin construction.

* * * *

PIPE COVE MOLDING

Pipe cove molding will be installed in each room containing Climate Command units to provide concealment of piping along wall at floor level. Molding will run from unit to wall and from unit to unit in rooms containing more than one unit.

Pipe cove molding shall be constructed with 22 gauge steel and shall be provided with mounting brackets to support 1¼" copper tubing of the main loop, ¾" condensate line and the cover. Finish shall be factory standard baked enamel in shell white.

ELECTRIC MOTORS

Motors shall be of General Electric Co., Westinghouse or approved equal, induction types and shall be designed, wound and built for quiet operation.

Motors shall be of the 40 degree C. ambient type and are to be rated in accordance with the American Standards for Rotating Electrical Machinery "(A.S.A.—C50 and are to comply with the regulation of the National Electrical Code.)

Motors below ½ horse power shall be wound for 120 volt, 60 hertz single phase, alternating current; and motors of ½ horse power and above shall be for 208 volt, 60 hertz, 1 phase, alternating current.

Motor speeds shall not exceed 1800 RPM.

Name plate ratings shall not be less than brake HP of equipment to be driven, in full range of operation conditions.

Two speed motors shall be of the induction type, single wound.

EXCEPTIONS

Any exceptions to this specification shall be listed in writing along with alternate prices listed in bid.

GUARANTEE

Manufacturer shall furnish a written guarantee for a period of one year after completion of installation and start-up covering any defects in materials and workmanship resulting from his work.

PLAINTIFF'S EXHIBIT 2

THE AUSTIN COMPANY
LUMP SUM SUBCONTRACT

THIS SUBCONTRACT entered into this 14th day of January, 1972, by and between THE AUSTIN COMPANY, an Ohio Corporation of Cleveland, Ohio (hereinafter called "CONTRACTOR"), and Hudik-Ross Co., Inc. (hereinafter called "SUBCONTRACTOR"), for certain work to be performed by Subcontractor in connection with construction work being, or to be performed by the Contractor for Norwegian Christian Home for the Aged, Inc. (hereinafter called "OWNER"), at: 1255 Ovington Avenue, Brooklyn, N.Y.

WITNESSETH: That it is hereby agreed by and between the parties hereto as follows:

ARTICLE 1. Subcontractor shall provide all the necessary materials and perform all of the following work, to be installed on the premises of Owner in accordance with terms and requirements of covering Purchase Order No. 1012-27, General Requirements, dated 1/4/71. The Specifications for pages SEE THE PURCHASE ORDER, inclusive, dated ..... And drawings SEE THE PURCHASE ORDER.

ARTICLE 2. (a) The price to be paid by Contractor and accepted by Subcontractor for the performance of this Subcontract is Two Hundred & Sixty Nine Thousand Five Hundred & Fifty & 00/100 Dollars ($269,550.00) subject to deductions and additions as herein provided. Payments on account shall be made: On the 20th day of each month, following the month of performance, eighty-five (85%) per cent of the cost of the work in place, as approved by Contractor, and proportionate to the amount of this Subcontract, for labor and materials acceptably incorporated into the work up to the last working day of the preceding month, less the aggregate of previous payments, provided that Subcontractor shall have paid in full

all bills for labor and materials, and if requested by Contractor, shall have submitted to it receipted invoices as evidence of payment of all accounts in full. The balance shall be paid thirty (30) days after entire completion and final acceptance. No certificate given or payment made (except the final certificate or the final payment) shall be evidence of the performance of this Subcontract either wholly or in part, and no payment shall be construed to be an acceptance of defective work or improper materials.

(b) No extra work shall be performed or paid for unless Contractor shall have issued, prior to the beginning thereof, its written order therefor. No increase or decrease in the price of the work to be performed shall be made, nor shall any claim be made for damages or anticipated profits except upon the written approval of Contractor.

* * * *

(d) Contractor may disburse from monies owing by it to subcontractor such sums as it may determine to be necessary to pay for materials, equipment, labor or supplies used, ordered, or delivered for incorporation into work to be performed by subcontractor.

Should subcontractor, in case of dispute, fail to pay claimed obligations for such materials, equipment, labor or supplies, subcontractor shall post bond or securities sufficient to protect Owner and Contractor against filing of any lien or encumbrance against property of Owner.

(e) Subcontractor shall procure Contractor's written approval before subletting any portion of this Subcontract for a sum exceeding five hundred ($500.00) dollars.

(f) Subcontractor, at Contractor's option and expense, shall furnish an approved Surety Company's bond for the performance of this subcontract.

ARTICLE 3. (a) Subcontractor shall substantially complete the work under this Subcontract to the entire satisfaction of Contractor and Owner, within ninety (90) working days after the date Subcontractor begins, or is instructed to begin, said work, whichever is earlier. Time is of the essence of this Subcontractor.

(b) A working day is a day, exclusive of Sundays, Saturdays and legal holidays, on which Subcontractor is able to employ effectively more than fifty per cent (50%) of the usual daily man hours (Job Staff excluded) for regular working hours.

(c) Should Subcontractor be delayed in the substantial completion of said work by Contractor or Owner, fire, strikes, lockouts, acts of public officials, embargoes or war, then said time shall be extended for a period equivalent to the time lost by reason of any of said causes, but no such allowance shall be made unless a claim therefor be presented in writing to Contractor within twenty-four (24) hours of the occurrence thereof.

ARTICLE 4. Subcontractor shall submit for approval 3 copies of all shop or setting drawings and schedules required for his work. Contractor's approval of such drawings or schedules shall not relieve Subcontractor of responsibility for errors of any sort in such shop drawings nor of responsibility for deviation therein from drawings and specifications furnished by Contractor unless Subcontractor has, in writing, advised Contractor of such deviation.

ARTICLE 5. Guarantee—Subcontractor shall repair and make good any damages, defects, or faults in Subcontractor's work or materials, including materials or equipment partially or completely covered by manufacturer's guarantee, together with work of other trades disturbed as a result of such repairs, that may appear within one years after date of final acceptance. Subcontractor shall also, within guarantee period, make any corrections or adjustments necessary to meet specified performance results.

ARTICLE 6. (a) Contractor, at any time before completion of the work, may order additions, omissions or alterations to or in the said work, materials or equipment, but no such changes shall be made except by a written order signed by Contractor in which the additional amount to be paid by it therefor or to be deducted

from said contract price, together with additional time, if any, for the performance thereof, shall be stated. Unit prices, if any are named in this Subcontract, shall be used in determining the value of such changes.

(b) All clauses of this Subcontract shall apply to any changes, omissions or extra work in like manner and to the same extent as the work contracted for, and no changes, omissions or extra work shall annul or invalidate this Subcontract.

(c) Should Contractor request Subcontractor to work overtime in order to expedite the final completion of the work, Subcontractor shall do so, and Contractor shall pay therefor only the actual labor cost over the rate of regular time for said overtime. Time slips covering said overtime, must be submitted to, checked and approved by Contractor at the site of the work. No commission or overhead shall be paid to Subcontractor for or on account of said overtime. If Subcontractor, in the opinion of Contractor, unduly delays the progress of the work, then, if requested by Contractor, Subcontractor shall at its sole expense perform such overtime work as may be necessary to finish said work within the specified time. Contractor's decision governing the necessity of said overtime shall be final.

ARTICLE 7. (a) Subcontractor shall provide proper facilities at all times for the inspection of the work by Contractor, Subcontractor, within twenty-four (24) hours after receiving written notice from Contractor to that effect, shall proceed to remove from the ground or buildings all material, whether worked or unworked, condemned by Contractor, and take down all portions of the work which Contractor shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

(b) Subcontractor shall cooperate with Contractor and all other subcontractors and materialmen employed on the work in order to avoid complications and insure first-class workmanship in every respect, and in the manufacturing, assembling and erection of the work shall em-

ploy only workers who are qualified, careful and efficient, in strict conformity with the best standard practices.

ARTICLE 8. (a) Subcontractor shall comply with all laws relating to workmen's compensation, occupational diseases, wages and hours, taxes and contributions in respect to unemployment insurance and all other laws and regulations, state and federal, applicable to persons directly or indirectly employed by said Subcontractor and other persons on said work. Subcontractor shall maintain in force insurance protection in amounts agreed upon covering Subcontractor's liability under workmen's compensation and occupational disease laws, Subcontractor's general liability (bodily injuries and property damage) including contractual coverage for undertakings under this Article and Subcontractor's liability with respect to the ownership and operation of automobiles. It also agrees, when required by law, to make payments to Subcontractor's employees or their dependents and to save Owner and Contractor harmless from all liability for such payments. Should any part of this subcontract be sublet, Subcontractor shall, in addition to the foregoing types of insurance, maintain Owner's and Contractor's Protective Liability Insurance in the same amounts, except that Owner's and Contractor's Protective Liability Insurance need not be maintained to the extent that its subcontractors maintain the same coverages required for Subcontractor. Certificates of all such insurance shall be furnished to the Contractor.

(b) Subcontractor agrees to indemnify and save harmless Owner and Contractor against all liability for personal injuries, including death resulting therefrom, sustained by any person directly or indirectly employed by Subcontractor or its subcontractors, caused or alleged to have been caused, directly or indirectly, by an act or omission, negligent or otherwise, by Owner or Contractor or persons directly or indirectly employed by them, and to assume the defense of any action brought by persons so injured or their personal representatives against Owner or Contractor to recover damages for such injuries.

(c) Subcontractor also agrees to indemnify and save harmless Owner and Contractor against all liability for personal injuries, including death resulting therefrom, and against all liability for property damage, sustained by any other persons or corporations whatsoever, including Contractor's or Owner's employees, caused or alleged to have been caused, directly or indirectly, by any act or omission, negligent or otherwise, on the part of Subcontractor, or its Subcontractors, or persons directly or indirectly employed by them and arising out of the performance, or in any way connected with the performance, of this contract, even though some act or omission, negligent or otherwise, of Owner or Contractor or persons directly or indirectly employed by them may also be a cause or an alleged cause of such injury.

(d) The extent of the Subcontractor's obligation under Article 8 shall be governed by the law of the State of Ohio.

ARTICLE 9. (a) Subcontractor agrees (1) to pay all federal or state sales and use taxes or similar levies on all material, tools and equipment furnished under this subcontract, and (2) to assume all risk and liability for loss or damage, however caused, to Subcontractor's material, tools, or equipment not incorporated in the work.

(b) Subcontractor shall provide and maintain at all times sufficient protection of all its work, material and equipment from damage or loss by theft, and shall protect Owner's, Contractor's and adjoining properties from any and all injury arising in connection with the performance of said work. Subcontractor shall make ?????, any such damage or injury suboccurring, without any expense whatsoever to Contractor or Owner.

ARTICLE 10. (a) Subcontractor, for itself and all persons, partnerships or corporations performing labor, doing work or furnishing materials in and about the erection and construction of said work, hereby expressly waives any and all liens of every kind or nature to which it and/or they are or may be entitled under any Act, Statute or otherwise.

(b) Subcontractor shall disclose this provision of this Subcontract to all said persons, partnership or corporations before any such labor or work is performed or material furnished and before any agreement with reference thereto is made by Subcontractor.

(c) Upon completion of all work required hereunder, Subcontractor shall submit with its invoices an affidavit by a qualified representative, to the effect that all obligations for labor and materials have been paid in full, accompanied by a waiver of lien rights.

ARTICLE 11. Subcontractor has thoroughly familiarized itself with the building site conditions and with the request for quotations, instructions to bidders, bulletins issued prior to the date for receiving of proposals, form of proposals, plans and specifications for said work, material and equipment, and is familiar with the shipping and delivery facilities and all other matters and conditions which will affect the operation and completion of said work and it assumes all risks therefrom.

ARTICLE 12. No assignment of this Subcontract or any money due, or which may become due hereunder shall be made without the written consent of Contractor.

ARTICLE 13. If Subcontractor becomes insolvent, or if a petition in bankruptcy be filed by or against it, or if it should make a general assignment for the benefit of creditors, or if a receiver should be asked or appointed for it, or if it should refuse or fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if it should fail to make prompt payment to its subcontractors or for material or labor (except where the liens of all such parties have been waived) or disregard laws, regulations, ordinances or the instructions of Contractor, or otherwise be guilty of a substantial violation of any provision of this Subcontract, or should the Subcontractor at any time refuse to start said work promptly, neglect to supply a sufficient number of properly skilled workmen, or sufficient materials of the proper quality,

or fail in any respect to prosecute the work with promptness and diligence, or if Subcontractor fail in the performance of any of the agreements herein contained. Contractor may, after twenty-four hours' written notice to Subcontractor, provide any such labor or materials, and deduct the cost thereof from any money then due or thereafter to become due to Subcontractor under this Subcontract; and at its option may terminate the employment of Subcontractor for the said work and terminate this Subcontract and may enter upon the premises and take possession, for the purpose of completing the work comprehended under this Subcontract, of all materials, tools and appliances thereon, and employ any other person or persons to finish the work, and provide the materials therefor; and in any such case of such termination of Subcontract or discontinuance of the employment, Subcontractor shall not be entitled to receive any further payment under this Subcontract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this Subcontract shall exceed the expenses incurred by Contractor in finishing the work and all other charge, expense or damage, such excess shall be paid by Contractor to Subcontractor; but if such expense and damage shall exceed such unpaid balance, Subcontractor shall pay the difference to Contractor.

ARTICLE 14. (a) ARBITRATION. In the event of any disagreement arising under this Subcontract, it shall, upon written notice of either to the other party, be submitted to three arbitrators for decision. Each party shall choose one arbitrator within ten days after receipt of such notice, the third to be chosen within ten days by the two thus selected. However, if within the time stipulated the two arbitrators appointed by the parties do not agree upon a third or a party who has been notified of a disagreement fails to appoint an arbitrator, then a third arbitrator or an arbitrator to represent the party in default, or both such arbitrators, may upon petition of either party be appointed by a Judge of a Court of general jurisdiction where the work is performed. The

decision of a majority of said arbitrators shall be final and binding upon both parties to this contract. Such arbitrators' decision shall be delivered to each party in writing on or before ten (10) days (or such further time as the arbitrators may fix) after the submission of any matter to them for their decision. Each party shall pay the cost and expense of the arbitrator it selects, but the cost and expense of the third arbitrator and the remainder of the expense of the arbitration shall be borne equally by the parties hereto. Arbitration proceedings shall not take place until after the completion or alleged completion of the work, except in a case where either party claims that the disagreement is of such nature as to make immediate arbitration proceedings necessary while the evidence is available. Without the consent of any interested insurance carrier, the foregoing provisions of this Article shall not require arbitration of any disagreements arising hereunder where any such disagreement has to do with any claimed liability of either party hereto which is protected in whole or in part by insurance.

(b) This entire agreement shall be and become a part of said purchase order by Contractor to Subcontractor as fully as though the terms hereof were written in said purchase order.

The foregoing agreement is binding upon the undersigned, their successors, executors, administrators and assigns.

IN WITNESS WHEREOF, the Parties have hereunto subscribed their names the day and year shown in said Purchase Order.

.....

By .....
Subcontractor

THE AUSTIN COMPANY

By (illegible)
Contractor

PLAINTIFF'S EXHIBIT 3

FROM

THE AUSTIN COMPANY
450 W. First Ave.
Roselle, New Jersey 07203

PURCHASE ORDER No. 1012-27

On Each Package and Invoice

Name of Job
Norwegian Christian
Home for the Aged, Inc.

CHARGE TO or
Work Order No. 70-1012

Date of Delivery
Attn: Mr. Frank Hudkik,
Pres.
Tele: 212-LW-4-2630

Date of Order January 14, 1972

NAME of
VENDOR Hudik-Ross Co., Inc.

Address 251 West 42nd Street, New York, N.Y. 10036

Deliver or Ship to The Austin Company
1255 Ovington Avenue
Brooklyn, New York.

Care of Norwegian Christian Home for the Aged, Inc.
Via Railroad or Truck TERMS—

PLEASE FURNISH SUBJECT TO CONDITIONS BELOW:

PURCHASE ORDER AND SUBCONTRACT

Furnish all necessary labor, mechanics, tools equipment and materials required for furnishing and installing complete the Heating, Ventilation and Air Conditioning work for the building we are constructing for the Norwegian Christian Home for the Aged, Inc., Brooklyn, New York in strict accordance with the Austin Company Drawings 70-1012 sheets 201 to 208 inclusive all revised 1/7/72, Specification 200, Heating, Ventilation and Air Conditioning, Pages i, ii, iii, 200-1 to 200-65 inclusive all dated 11/19/71, addendum No. 1. Pages 200—addl 1 to 200—addl 16 inclusive all dated 11/20/71.

The following allied specification, indicating equipment furnished and delivered by others for installation by this sub-contractor are incorporated into this subcontract:

A. Specification 201 — Room Heating and Air Conditioning Units, Pages 201-1 to 201-6 inclusive all dated 11/29/71.

B. Specification 202 — Cooling Tower, Pages 202-1 to 202-3 inclusive all dated 11/9/71.

C. Specification 203 — Self Contained Air Conditioning Units, Pages 203-1 to 203-5 inclusive all dated 11/30/71.

D. Specification 204 — Hot Water Generators, Pages 204-1 to 204-6 inclusive all dated 10/15/71 and addendum No. 1 Add—1-1 and Add 1-2 both dated 11/9/71.

E. Specification 205 — Evaporative Coolers, Pages 205-1 to 205-4 inclusive all dated 10/15/71. Addendum No. 1 add —1-1 dated 12/17/71.

F. Specification 206 — 10,000 Gallon Fuel Oil Tank, Pages 206-1 and 206-2, and Sketch 206-2.

G. Specification 207 — Heating and Ventilating Units, Pages 207-1 to 207-5 inclusive all dated 11/30/71.

The above stated drawings and specifications initiated by both parties signing this subcontract are to be considered as subcontract drawings and specifications.

Not included in the scope of this work are the following items:

A. Excavation and backfill.

B. Furnish and install linen chute.

C. Electrical Work

D. Furnish and install stack for Hot Water Generator.

E. Sales and Use Tax.

The hand written objections, Pages 1 and 2 affixed to this purchase order and subcontract, is included and becomes part of the subcontract documents.

Included in the amount noted in Article Two of the subcontract are the various changes as discussed on January 7th 1972 at the time the Letter of Intent was signed by representatives of both The Austin Company and Hudik Ross Co., Inc.

In accordance with the Austin Company Letter of Intent dated January 7, 1972, a copy of the Slant Fin Commercial Division Letter of January 13, 1972 addressed to the Austin Company stating the Guarantee as requested by this subcontractor is affixed to this purchase order and subcontract. This document is incorporated into and becomes part of this purchase order and subcontract. The Honeywell recommended Climate Command Control System attached hereto (noted in Slant Fin Letter of January 13, 1972) is also included as part of the subcontract documents.

Terms of Payment: Per Article Two of this Subcontract. Equal Employment Opportunity Clause attached hereto

is incorporated into and becomes part of this Purchase Order and Subcontract.

This subcontractor agrees to comply with all safety and health standards as required by the Williams-Steiger Occupational Safety & Health Act.

The attached conditions and General Requirements of the Purchase Order shall be incorporated into and become part of this Purchase Order and Subcontract.

In the event that The Austin Company authorizes this subcontractor to perform additional work on a Time and Material basis the following shall apply:

> Actual cost of Material, Equipment and Labor includes Insurance, Taxes and Fringe Benefits plus 10% for overhead and 10% for profit.

Tax Exemption Certificate is affixed to this purchase order and subcontract.

HES/emk

The following Conditions form a part of this Order:

1 SHIPPING NOTICE—shall be mailed as soon as Material has been forwarded, giving Order Number, Car Number and Initials, also condensed description of Material otherwise Vendor is liable to demurrage.

2 INVOICE IN TRIPLICATE. To mailing address above.

3 CAR LOADS—shall be loaded to minimum capacity—if not, the Vendor agrees to pay the excess freight.

4 PATENTS—Vendor agrees to protect and hold harmless Purchaser and Owner from and against all and every demand or demands of any nature or kind by reason of the use of any patented invention, article or appliance, that has been or may be adopted or used in the construction of any of the Material or Articles called for on this Purchase Order.

5 CARTAGE OR PACKAGES—no charges will be allowed for either.

6 INSURANCE—It is understood that Vendor will carry Public Liability, Workmen's Compensation and Property Damage or other necessary insurance and agrees to protect and indemnify The Austin Company against all claims for damages, lawsuits, etc. which may arise in connection with the fulfillment of this Purchase Order. Any limitation of the liability or responsi-

bility of Vendor by provisions of Vendor's delivery tickets or other instruments, shall be entirely ineffective.

7 It is agreed that goods or services furnished under this Purchase Order shall comply with all Federal, State and other laws applying thereto.

/s/ H. E. Stillwell
H. E. STILLWELL,
Proj. Purch. Agt.

PURCHASING AGENT

DISTRICT PURCHASING

FROM
THE AUSTIN COMPANY

PURCHASE ORDER No. 1012-23A
On Each Package and Invoice

Name of Job
Norwegian Christian
Home for the Aged, Inc.

CHARGE TO or
Work Order No. 70-1012
Date of Delivery

Date of Order March 22, 1972

NAME of
VENDOR MECHANICAL SALES CORP.

Address P.O. Box 321, Passaic, New Jersey 07055
Deliver or Ship to

The Austin Company, 1250 - 67th Street, Brooklyn, New York

Care of Norwegian Christian Home for the Aged, Inc.
Via Railroad or Truck TERMS—

PLEASE FURNISH SUBJECT TO CONDITIONS BELOW:

PLAINTIFF'S EXHIBIT 5

CHANGE ORDER "A"

Refer to our original Purchase Order No. 1012-23 dated January 4, 1972 and make the following changes:

1. Change name of Vendor to:

SLANT/FIN CORPORATION
c/o Mechanical Sales Corp.
P.O. Box 321
Passaic, New Jersey 07055

2. Delete the furnishing and delivery of Stamped Aluminum Exterior Grilles (114), Wall Boxes (114), and Baked Enamel Finish for Exterior Grilles.

PRICE ..... $741.00 (CREDIT)
This Change Order shall be incorporated into and become part of our original Purchase Order No. 1012-23 dated January 4, 1972. All other terms and conditions shall remain the same except as detailed herein.

The following Conditions form a part of this Order:

1 SHIPPING NOTICE—shall be mailed as soon as Material has been forwarded, giving Order Number, Car Number and Initials, also condensed description of Material otherwise Vendor is liable to demurrage.

2 INVOICE IN TRIPLICATE. To mailing address above.

3 CAR LOADS—shall be loaded to minimum capacity—if not, the Vendor agrees to pay the excess freight.

4 PATENTS—Vendor agrees to protect and hold harmless Purchaser and Owner from and against all and every demand or demands of any nature or kind by reason of the use of any patented invention, article or appliance, that has been or may be adopted or used in the construction of any of the Material or Articles called for on this Purchase Order.

5 CARTAGE OR PACKAGES—no charges will be allowed for either.

6 INSURANCE—It is understood that Vendor will carry Public Liability, Workmen's Compensation and Property Damage or other necessary insurance and agrees to protect and indemnify The Austin Company against all claims for damages, lawsuits, etc. which may arise in connection with the fulfillment of this Purchase Order. Any limitation of the liability or responsibility of Vendor by provisions of Vendor's delivery tickets or other instruments, shall be entirely ineffective.

7 It is agreed that goods or services furnished under this Purchase Order shall comply with all Federal, State and other laws applying thereto.

W. M. BOGOCKI

PURCHASING AGENT

DISTRICT PURCHASING

FROM
THE AUSTIN COMPANY

PURCHASE ORDER No. 1012-23
On Each Package and Invoice

Name of Job
Norwegian Christian
Home for the Aged, Inc.

CHARGE TO or
Work Order No. 70-1012
Date of Delivery
Attn: Sam Jaffe
Tele: 773-7040

Date of Order January 4, 1972

NAME of
VENDOR Mechanical Sales Corp.

Address P.O. Box 321, Passaic, New Jersey 07055

Deliver or Ship to

The Austin Company
1250 - 67th Street, Brooklyn, New York

Care of

The Norwegian Christian Home for the Aged, Inc.
Via Railroad or Truck TERMS—

PLEASE FURNISH SUBJECT TO CONDITIONS BELOW:

PURCHASE ORDER

Furnish and deliver all of the required room heating and air conditioning units as shown and called for on the Austin Company Specifications 201-1 to 201-6 dated November 29, 1971, and The Austin Company Drawing number 204 revised November 20, 1971.

The above revised drawing and specifications are now all in your possession.

The Mechanical Sales Corporation quotation number SF107-471 dated December 13, 1971 is incorporated into and becomes part of this Purchase Order.

Fifty four (54) Slant/Fin Climate Command WC9—unit "B"

Fifty (50) Slant/Fin Climate Command WC12—unit "C"

Ten (10) Slant/Fin Climate Command WC16—unit "D"

All the above for the sum of $51,100.00

Include Painted baked enamel exterior louver to match exterior of building, add the sum of ..... $ 285.00

Include Insulated pipe cove moulding, add the sum of ..... $ 3,712.00

TOTAL AMOUNT OF THIS PURCHASE ORDER $55,097.00

The prices stipulated above includes the following:

Freight

Fresh air intake with aluminum louver, natural color

Motorized damper door with on-off switch

Pipe cove (uninsulated) moulding with accessories

Seven (7) master control units with eleven (11) slaves, including wall mounted thermostat and automatic changeover control

Special N.Y.C. code electrical plug in recepticles and prewired

Five (5) year compressor warranty

Factory assembled and prepiped units with gate valves for mono-flow series loop installation

Self-contained thermostats and push button control board

It is agreed that you shall submit in triplicate to the Austin Company, 450 W. First Avenue, Roselle, New Jersey—07203, three (3) copies of shop drawings and engineering data for formal approval by the Austin Company within three weeks from date of this Purchase Order.

Shipment shall be made complete within 8 to 11 weeks after date of receipt of approval of the shop drawings. This purchase is exempt from Sales and Use Tax. Attached hereto is a copy of the Tax Organization Certificate.

The following Conditions form a part of this Order:

1 SHIPPING NOTICE—shall be mailed as soon as Material has been forwarded, giving Order Number, Car Number and Initials, also condensed description of Material otherwise Vendor is liable to demurrage.

2 INVOICE IN TRIPLICATE. To mailing address above.

3 CAR LOADS—shall be loaded to minimum capacity—if not, the Vendor agrees to pay the excess freight.

4 PATENTS—Vendor agrees to protect and hold harmless Purchaser and Owner from and against all and every demand or demands of any nature or kind by reason of the use of any patented invention, article or appliance, that has been or may be adopted or used in the construction of any of the Material or Articles called for on this Purchase Order.

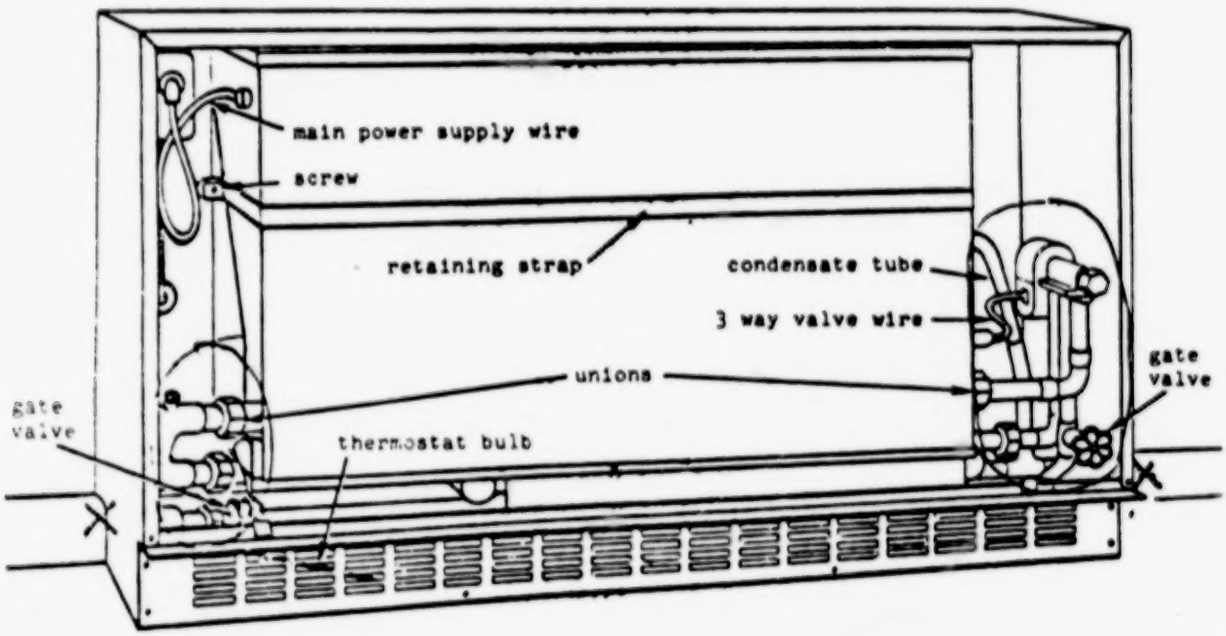
5 CARTAGE OR PACKAGES—no charges will be allowed for either.

6 INSURANCE—It is understood that Vendor will carry Public Liability, Workmen's Compensation and Property Damage or other necessary insurance and agrees to protect and indemnify The Austin Company against all claims for damages, lawsuits, etc. which may arise in connection with the fulfillment of this Purchase Order. Any limitation of the liability or responsibility of Vendor by provisions of Vendor's delivery tickets or other instruments, shall be entirely ineffective.

7 It is agreed that goods or services furnished under this Purchase Order shall comply with all Federal, State and other laws applying thereto.

/s/ H. E. Stillwell
H. E. STILLWELL,
Purch. Agt.

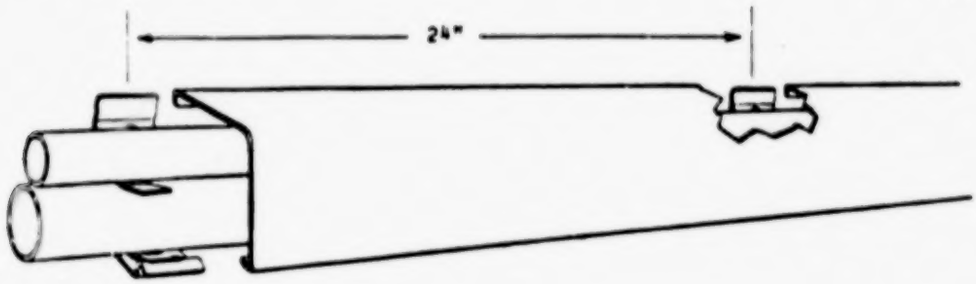
PURCHASING AGENT



If desired, the entire air conditioning chassis may be removed from the cabinet. Shut water off by closing gate valves at each end of unit. Remove 2 screws and retaining strap, disconnect 2 unions, disconnect rubber condensate tube, unplug wire from 3-way valve, unplug main power supply wire, unclip thermostat bulb and push into recess under chassis. Air conditioning chassis is now free to slide out of cabinet.

Connect electrical cable to receptacle in handy box inside cabinet. If air conditioning chassis was removed for installation, reinstall by reversing steps outlined above.

ALONG-WALL PIPING: 1 1/4" supply tubing and 3/4" condensate line may be concealed within prefabricated pipe-cove molding (available in 5' lengths only).



Mount brackets on 2' centers (3 per 5' length). Rest bottom of bracket on finished floor line; use spacers if working on sub-flooring. Rest 1 1/4" supply tubing on lower arm of bracket; install 3/4" condensate line on upper arm of bracket. Install balancing valve at beginning or end of each loop, and install flow meter fitting (B & G Thermoflo, Taco #737, or similar) in each loop, to permit accurate balancing after installation is complete. After

X X X

PLAINTIFF'S EXHIBIT 8

CONSTRUCTION PROGRESS MEETING NO. 12
W. O. 70-1012

BROOKLYN, NEW YORK

NORWEGIAN CHRISTIAN HOME

A meeting was held on the job site on Thursday, 6/29/72

PRESENT:

Mr. A. Churson—Hudik-Ross, Inc.

Mr. A. J. Desiderio—A. J. Desiderio, Inc.

Mr. R. S. Grand—The Austin Company
Mr. P. D. Plath—The Austin Company
Mr. J. Puchalski—The Austin Company

DISCUSSION:

ELECTRICAL—P & T ELECTRIC COMPANY, INC.

1) Manpower—1 + 9
2) Percentage complete—50
3) Purchasing
   a) Motor Control Center & Switchboard—ITE—MCC back boxes on job—MCC panels delivered 6/12—Switchboard—has slipped—originally not delivered on 6/23 as promised—EXPEDITE
   b) Nurses Call System, Paging and TV System—Roughing material is in stock—fabrication of balance of order to be completed by 6/22—P & T to confirm if this is complete
   c) Fire Alarm, Smoke Detector and Door Release Systems—All materials and equipment are in stock.
   d) Light Fixtures—major items are in stock—remainder are being fabricated—no delivery problems—fixture schedule was mailed to Austin week of 6/5

Construction

a) Basement Slab Conduits—95% complete—balance consists of work in the Electrical Equipment Room—This work is proceeding very slowly—P & T will concentrate on this item—need minimum of one week to complete

b) Switchgear—estimate one week to install and two to three weeks for Con Edison to complete service hook-up—P & T may be able to get a temporary hook-up if the permanent hook-up is too late—The ITE equipment will be required for a temporary hook-up.

c) Conduit in dry wall—estimate 3 days/floor—more men will be added in order to maintain this schedule.

PLUMBING—A. J. DESIDERIO, INC.

1) Manpower—1 + 12—workforce will be reduced by 2 on 6/30—Union Agreement expires end of July 1972

2) Percentage complete—45%

a) Fire Hose Cabinets—being installed

b) Kitchen Equipment—a coordination meeting will have to be held to clear up questions on roughing and installation—to be set up for week of July 3rd.

c) Sanitary risers—complete through roof

d) Water risers—all risers are completed with the exception of P-9—to be completed by July 6th.

e) Insulation—3 men on job—expecting strike on July 1st.

f) Basement Cast Iron—complete except for kitchen connections.

g) Street Connections—started 6/26—work is proceeding slowly—A.J.D. to expedite.

H.V.A.C.—HUDIK-ROSS, INC.

1) Manpower—Sheet metal workers—2, Pipefitter—1 + 6—Austin feels that a minimum of 12 pipefitters are required on the job. H. R. stated that they have sufficient manpower at this time

2) Percentage complete—40

a) Fuel Oil Tank—Approval to proceed was mailed to H. R. on 5/26—estimate 3 days to install piping. H. R. will coredrill necessary holes in the basement walls—This work to be completed week of July 3rd

b) Slant Fin Units (114)—by Austin—on job hook-up of same being handled by F. Hudik—Steamfitters Union states that they will not hook up same as they are preassembled

c) Roof fans—by Hudik-Ross—no delivery dates—H. R. to inform Austin of delivery dates by July 6th

d) Cooling Tower and Evaporative Cooler—by Austin—Baltimore Air Coil. Rigged on roof on 6/5—no work has been done on these units to date.

e) Sheetmetal—all S.D. have been approved with the exception of the 5th floor and the Mechanical Equipment Room, and have been released for fabrication. Suna Sheetmetal to resubmit S.D. on ductwork in Central Wash Areas—H-R will submit S.D. to Austin by 7/7 on future in the Mechanical Equipment Room—This area is still on hold because of this item

f) Emergency Generator Exhaust Stack—H-R stated that this is not included in their contract—request for extra sent to Austin on 6/26—PURCHASING PLEASE NOTE

g) Automatic Controls—D.D. returned approved to H-R on 6/27—type of valves are still in question—J. Puchalski to advise

h) Starters for Equipment—H.R. questioned location of same

i) Construction Schedule—H.R. will send a copy of their schedule to the job and to Austin/Roselle week of 7/3

FIRE PROTECTION

GOULD AUTOMATIC SPRINKLER

1) Manpower—2—back on job as of 6/27

2) Percentage complete—25%

a) Basement Piping—complete except for Mechanical Equipment Room which is on hold.

b) Shop Drawings—1st thru 4th floor are approved —5th floor S.D. will be completed by 7/7 providing coordination drawing is transmitted by A. J. Desiderio to Gould by 6/30

c) 1st Floor Piping—work started on 6/27—estimate 3 days to complete

d) Street Connections—to start week of 7/3—estimate one week to complete

P. D. Plath
Project Superintendent

cc:

All Present
V. Napoli
A. Churson
A. Desiderio
C. Ottman
H. Stenger
P. Plath
J. Bennett
K. Rumzie
H. Bandtlow
D. MacDonald
G. Ernst
S. Schaeffer
R. Grand

PLAINTIFF'S EXHIBIT 9

ENTERPRISE ASSOCIATION — LOCAL UNION 638

WORKING AGREEMENT

Effective July 11, 1966 Terminates June 30, 1969

This WORKING AGREEMENT made and entered into this ..... day of ....., 196..., by and between ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC, SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPE FITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA (hereinafter referred to as ENTERPRISE, 841 Broadway, New York City, N.Y.), and HUDIK-ROSS CO., INC. [Full Name of Employer—(If a partnership give names of all partners and firm name)] of 230 West 41st Street, New York, N.Y. 10036 [Business Address] (hereinafter referred to as the EMPLOYER),

WITNESSETH:

WHEREAS, ENTERPRISE is a Labor Union representing steamfitters and apprentices engaged in the steamfitting trade and its allied branches in the area comprising the City of New York and Nassau and Suffolk Counties, State of New York; and

WHEREAS, the EMPLOYER has occasion to employ steamfitters and apprentices in connection with such work and desires to enter into an agreement with ENTERPRISE with respect to such employment and the terms and conditions governing the same;

NOW, THEREFORE, it is mutually agreed between the parties hereto as follows:

ARTICLE ONE
WORKING RULES—WAGES AND HOURS

The parties agree that during the term of this agreement, the attached Rules, numbered "I" to "XXIV" inclusive, governing wages, hours, Welfare Fund, Pension Fund, Educational Fund, Vacation Plan, Security Fund, Industry Promotional Fund and other conditions of employment shall apply to the hiring and employment of all steamfitters and apprentices and shall be in full force and effect and constitute part of this agreement. The parties hereto agree to observe and enforce all of the terms and conditions contained in said Rules.

ARTICLE TWO
STRIKES OR LOCKOUTS

It is further mutually agreed that no strike against the EMPLOYER shall be ordered by any officer of or entered into by any member of ENTERPRISE, nor shall any lockout against members of ENTERPRISE be declared by the EMPLOYER, so long as this agreement and the rules hereto attached are conformed to by both parties.

ARTICLE THREE
JOINT ARBITRATION PLAN

It is further mutually agreed that both parties to this agreement shall abide by a Joint Arbitration Plan that may be agreed upon by the representatives of the several employers' associations and a majority of the unions of the building trades of New York City.

It is mutually agreed between the parties hereto that in event of disputes between trades, and disputes relative to question of jurisdiction of trade, the parties will abide by previous decisions as to jurisdiction published in the latest issue of the B.T.E.A. Handbook, commonly known as "The Green Book."

It is mutually agreed between the parties hereto that disputes between trades, and disputes relative to jurisdiction of trade not covered by decision in the latest

issue of the B.T.E.A. Handbook, commonly known as "The Green Book," shall be adjusted in accordance with the principles of the New York Plan for the Settlement of Jurisdictional Disputes as set forth in the Joint Arbitration Plan of the New York Building Trades as adopted on July 9, 1903 and amended on April 22, 1905, and as thereafter amended, except to the extent that Section 3 of the said Joint Arbitration Plan requires the employer to employ only members of the union directly or indirectly through subcontractors or otherwise.

Pending determination of any dispute under the New York Plan for the settlement of jurisdictional disputes as stated in the preceding paragraph the members of the union shall remain at work on the project without change in status.

ARTICLE FOUR
TERM OF THIS AGREEMENT

It is further mutually agreed that no change in this agreement shall be asked for by either party hereto, to take effect prior to the first day of July, 1969.

ARTICLE FIVE

It is understood and agreed that this agreement is based upon the Principles for Trade Agreements as set forth in the printed annex to this agreement, and nothing in the Rules of the Enterprise Association attached hereto, or within this agreement shall be interpreted to contradict or nullify any of the said Principles.

It is understood and agreed that in case any provision of this agreement shall be found to be contrary to law, such finding shall not in any way affect the other provisions of this agreement, which shall, notwithstanding, continue in full force and effect.

In the event of change of applicable Federal laws affecting this agreement, by virtue of which change it shall become legal for the Enterprise Association to demand that only members of Enterprise Association be employed in the performance of work under its jurisdiction, or to

institute what is commonly known as the "closed shop," the Employer agrees that in such event and on the giving of ten (10) days' notice to the Employer by Enterprise Association in writing by registered mail, this agreement shall be deemed amended to the end that on and after the conclusion of the said ten (10) days period only members of the Enterprise Association shall be employed by the Employer in the performance of work coming within the jurisdiction of Enterprise Association and only members of the Metal Trades Branch of Local Union 638 shall be employed in the performance of service work more particularly described in Rule XVI of this agreement.

ARTICLE SIX

This agreement shall supersede and replace all previous agreements entered into between ENTERPRISE and the EMPLOYER, upon the understanding that the EMPLOYER shall continue to be responsible for any moneys heretofore payable with respect to the Pension Fund, Welfare Fund, Educational Fund, Vacation Plan and the Security Fund.

IN WITNESS THEREOF, this agreement has been signed by a duly authorized officer of ENTERPRISE and the EMPLOYER the day and year first above written.

ENTERPRISE ASSOCIATION, LOCAL UNION 638

By /s/ John J. Tracey
Business Agent-at-Large
Hudik-Ross Co., Inc.

By /s/ Frank Hudik
Employer

Date Signed 3-14-67
(Full Individual, Firm or Corporate Name)

Business Agent .....

Address: .....

RULES

Rules of the Enterprise Association applying to work at the steamfitting trade and its many branches, in the City of New York and in Nassau and Suffolk Counties, New York.

RULE I

WORKING DAY

SECTION 1. The hours of labor shall be seven (7) hours per day, to be performed between the hours of eight (8:00) o'clock A.M. and four (4:00) o'clock P.M., as designated by the employer, every day except Saturday, Sunday and legal holidays.

SECTION 2. No steamfitter or apprentice shall be allowed to apply to any shop or office for employment except between the hours of eight (8:00) o'clock A.M. and four (4:00) o'clock P.M.

SECTION 3. If a steamfitter is employed on Temporary Heat, the twenty-four hour day shall be divided into three (3) shifts of eight (8) hours each. One or more of these shifts may be used.

SECTION 4. Each shift shall be known as the working day for temporary heat, every day including Saturday, Sunday and legal holidays.

SECTION 5. The working days above named shall be known as regular time and shall be time actually employed at work.

* * * *

RULE V

MEN TO WORK IN UNITS OF TWO

All work to be performed within the jurisdiction of Enterprise Association must be performed by journeymen steamfitters or apprentices working in units of two,

one of whom must be a steamfitter. A unit shall be composed of:

A. Steamfitter with a steamfitter, or

B. Steamfitter with an apprentice.

RULE VI

WHERE STEAMFITTERS AND APPRENTICES ARE TO BE AT 8:00 O'CLOCK A.M.

Each steamfitter and apprentice shall be paid from the time at which he arrives at his work within the territory of Greater New York and all of Long Island and there shall be no board or carfare paid to steamfitters or apprentices working in said territory.

A steamfitter who is sent to work outside of the above noted territory shall take the boat, train or car leaving either of the extreme points of the territory, as directed by his employer, going on boat, train or car leaving nearest eight (8:00) o'clock A.M. and returning take the boat, train or car arriving nearest four (4:00) o'clock P.M.

RULE VII

EXPENSES ALLOWED TO STEAMFITTERS

Each steamfitter working outside of the limits described in Rule No. VI shall receive from his employer traveling expenses to and from the place at which the work is located for as many trips as he is directed by his employer to make. He shall also receive a reasonable amount of board paid by him and he shall receive regular wages for all regular time consumed in traveling.

If the steamfitter leaves his work before it is completed and without the consent of his employer, it shall be at his own time and expense.

RULE VIII

In going from his shop to his work, or from his work to the shop, a distance of more than one (1) mile, each

steamfitter or apprentice shall receive from his employer the necessary fare.

RULE IX

CUTTING PIPE AND MAKING UP FITTINGS

Pipe up to and including four inches (4") diameter, with the exception of sprinkler work, radiator branches, convector branches and coil connections shall be cut, threaded and have fittings screwed on by hand or machine either on the job or in the shop of the direct employer at the option of the employer. If the pipe is cut and threaded on the job the work shall be done in accordance with Rule V.

If the pipe is cut, threaded and fittings are screwed on in the shop of the direct employer and said shop is equipped with permanently installed pipe cutting and threading machinery and it has been the practice of the employer to cut and thread pipe and screw on fittings in said shop, then the work shall be done by a steamfitter working alone. When a direct employer who has had no permanently installed pipe cutting machinery in his shop desires to do this work in his shop, such work shall be done in accordance with Rule V.

Radiator branches, convector branches and coil connections shall be cut and threaded by hand on the job in accordance with Rule V.

All fittings on sprinkler work five inches (5") and under shall be made up according to Rule V.

All pipe used for temporary radiator connections having been cut by hand on the job and returned to the shop may be used again.

RULE X

WELDING

Acetylene, electric or other forms of cutting or welding shall be done either in the shop or on the job of the direct employer at the option of the employer.

If welding is done in the shop of the direct employer, the work shall be done by a steamfitter working alone. All welding work done on the job shall be done in accordance with Rule V.

The fabrication of van stone joints, the making of hammer welds, or the welding of boiler headers, street steam headers, circular coils, trombone coils, zigzag coils, trunk coils, double pipe refrigerating machine coils, atmospheric type condensers, absorbers, weak liquor coolers and rectifiers of refrigerating machines may be done by the employer without reference to any jurisdiction by Enterprise Association. All other pipe welding is to be performed by journeymen steamfitters.

RULE XI

TEMPORARY HEAT

SECTION 1. Steamfitters working alone shall have jurisdiction in the operation and/or maintenance of all temporary heat work at all times whenever temporary heat is on a building regardless of the source of heat supply. If the fire is banked or if no heat is in the radiators, steamfitters shall have no claim for temporary heat operation and/or maintenance. Steamfitters shall have no claim for temporary heat operation and/or maintenance in any building or structure or addition thereto that will have a total of 1,500 sq. ft. of radiation or less, exclusive of mains and risers installed in said building or structure or addition thereto when completed.

* * * *

PLAINTIFF'S EXHIBIT 10

INTERIM AGREEMENT

IT IS AGREED AND UNDERSTOOD, by and between the undersigned Employer and ENTERPRISE ASSOCIATION, STEAMFITTERS LOCAL 638, hereinafter referred to as the Union, that

1. Except as specifically modified herein the agreement between the Employer and the Union which expired on June 30, 1972 shall be extended for an additional period of one year and shall terminate on June 30, 1973.

2. Rule XXIV (Industry Promotion Fund) and Rule XXV (Urban Affairs Fund) shall be deleted.

3. Rules II, III, IX, X, XI, XVII and XXIII shall be modified as follows:

(A). Rule II (Rate of Wages)

From July 1, 1972 to June 30, 1973 inclusive the hourly wage rate of $8.115 shall be increased by .685¢ per hour. This sum of .685¢ per hour shall be deposited weekly in an escrow bank account opened and maintained by the Employer in the Employer's name as Escrowee, to be paid to Steamfitters and/or Apprentices and to the Steamfitters Local 638 fringe benefit funds when the increase is approved by the Construction Industry Stabilization Committee. The bank book showing such deposits and all supporting data shall be furnished to the Union from time to time on the Unions request. In the event the full increase is not approved in its entirety so much as is approved shall be disbursed by the Employer out of the escrow account at the Union's request and the parties shall renegotiate the wage increase at the discretion of the Union.

The Union shall have the right to allocate the wage increase among the wage rate and the Steamfitters Local 638 fringe benefit funds.

Section III shall read as follows:

"Section III. Apprentices shall be paid a progressively increased schedule of wages for five years based on the following percentages of the wage rate payable to journeymen steamfitters, and subject to the provisions of Rule XX with respect to payments to Apprentices for attendance at classes:

1st half of 1st year 40% of a journeyman steamfitter's rate of wage

2nd half of 1st year 45% of a journeyman steamfitter's rate of wage
1st half of 2nd year 50% of a journeyman steamfitter's rate of wage
2nd half of 2nd year 55% of a journeyman steamfitter's rate of wage
1st half of 3rd year 60% of a journeyman steamfitter's rate of wage
2nd half of 3rd year 65% of a journeyman steamfitter's rate of wage
1st half of 4th year 70% of a journeyman steamfitter's rate of wage
2nd half of 4th year 75% of a journeyman steamfitter's rate of wage
5th year 85% of a journeyman steamfitter's rate of wage

In addition to the hourly rates above, contributions to the Welfare, Pension and Vacation Funds shall be made at the same percentage of Fund payments for Steamfitters as the percentage of wages. The other Funds shall be at the same rate as for Steamfitters."

As so modified Rule II shall continue in effect for the period of this Agreement.

(B) Rule III (Rate for Overtime and Holidays)

A new Section III shall be added: There shall be no overtime worked unless consented to by the Union.

(C) Rule IX (Cutting Pipe and Making Up Fittings)

New paragraphs shall be added to Rule IX reading as follows:

"All pipe which is cut, threaded, grooved or has fittings made up in the shop must be labeled before leaving the shop. Labels shall be obtained by the employer by written application to the Union. Labels shall bear, both the Employer's and Employees' names before the label is affixed. Unlabeled work shall not be installed.

All Pipe hangers, except sprinkler work made of manufactured and, or fabricated components, shall be assembled and erected on the job in accordance with Rule V. Sprinkler hangers shall be assembled on the job or in the shop of the direct employer.

All hanger rods shall be cut on the job or in the shop of the direct employer.

The erection of all hangers, supports, stands and structural attachments for work covered by this agreement is the work of steamfitter and/or apprentice working in the geographic jurisdiction of the Union."

As so modified Rule IX shall continue in effect for the period of this Agreement.

(D) Rule X (Welding)

A new paragraph shall be added to Rule X reading as follows:

"All pipe fabrication performed in a shop must be labeled before leaving the shop. Labels shall be obtained by the Employers by written application to the Union, and labels shall bear the employers and employees names before use. Unlabeled work shall not be installed."

As so modified Rule X shall continue in effect for the period of this Agreement.

(E) Rule XI (Temporary Heat)

It is specifically understood that the within Rule XI shall also apply to air conditioning and all references to temporary heat shall be deemed to apply to air conditioning as if the same were set forth at length in this Rule.

(F) Rule XII (Care of Tools)

The within Rule XII shall be rewritten so as to substitute the following language for the priod language in Rule XII:

"RULE XII. TOOLS AND SHANTIES

Section I. The Employer shall provide all necessary tools required for the fitter to perform the work. The fitter shall comply with all Employer rules and regulations in the use and care of these tools, and promptly report any that are missing, destroyed or in need of repair.

Section II. The Employer shall provide suitable shanties and dressing facilities on all jobs. These

shall be heated during winter months. Where these are prefabricated for job assembly, they shall be assembled by fitters.

Section III. In the event an employee's working clothes are destroyed by fire during other than working hours, the Employer shall compensate the employee for the replacement of these articles, but in no event shall the amount for replacement exceed Fity Dollars ($50.00) per man. In the event personal property, including street or dress clothes of an employee, are destroyed due to fire, during working hours, the amount of damage shall be limited to Seventy-Five Dollars ($75.00)."

(G) Rule XVII (Job Stewards)

The within Rule XVII shall be rewritten so as to substitute the following language for the prior language in Rule XVII:

"RULE XVII—JOB STEWARDS

Where the Employer employs four (4) or more units (as defined in Rule V) of Enterprise Association members on a job, then the members of Enterprise Association on the job shall select from one of such units a Job Steward, who shall be a working steamfitter and who shall act in behalf of the interests of the Union and whose duties shall not interfere with the work he is employed to perform by his Employer.

When the Employer of a Job Steward has four (4) or more units working overtime on the job where the Job Steward is employed, the Job Steward and his partner shall be included in one of the units working overtime.

The steamfitter in charge shall be the Shop Steward whenever less than four (4) units are employed on the job.

The Employer agrees not to discriminate in any way against any person so designated as Job Steward, either due to his being designated or to his activities in behalf of Enterprise Association and its members."

(H) Rule XXIII (Surety Company Bond)

The within Rule XXIII shall be rewritten so as to substitute the following language for the prior language in Rule XXIII:

"RULE XXIII. BONDING AND FUND PAYMENT REQUIREMENTS AND ADMINISTRATION

Section I. Each Employer shall furnish a bond to the joint benefit of the Trustees of the Steamfitters' Industry Welfare Fund, the Steamfitters' Industry Pension Fund, the Steamfitters' Industry Educational Fund, the Steamfitters' Industry Vacation Plan, the Steamfitters' Industry Security Benefit Fund, guaranteeing payment to said Trustees, jointly and severally, of any and all amounts due from said Employer to each of all of said Funds or Plan, pursuant to the terms of this Agreement. Such bond shall be in form and substance satisfactory to the said Trustees, jointly.

The aggregate amount of the bond shall be determined by the following:

0 to 20	Local 638 Employees	$ 5,000.00
21 to 70	Local 638 Employees	$10,000.00
Over 70	Local 638 Employees	$30,000.00

Section II. Each Employer will make the required Fund payments provided for in this Agreement within fourteen (14) calendar days following the close of the work week, i.e., for a work week ending on Wednesday the Fund payments must be paid no later than the second following Wednesday except where Trustees have, in writing, authorized other terms.

Application for such less frequent payments should be made in writing by the Employer and shall, upon approval require a bond for double the amount required in Section I.

Reporting of Fund payments by employees name shall be submitted at the same time as payments.

Section IV. The Trustees may at any time direct a payroll audit of any Employer to verify the Fund payments.

The Trustees shall notify the appropriate Enterprise Association officials of all delinquent Employers for action as provided below. All Bonds furnished under this Rule shall provide for the payment of interest at 8% per annum on any delinquent Fund payments or wages in addition to the principal amount and shall also reimburse the Funds for the reasonable expense of collecting such delinquency. The Union may remove the men from a contractor who has been found delinquent in his Fund payments."

4. Where the prior agreement, which terminated on June 30, 1972 made references to the "Association" such references shall be modified or deleted insofar as they are inconsistent with the intention of the parties to enter into an agreement which is independent of and separate from any "Association" contract.

5. If an agreement is reached prior to June 30, 1973 by the Union with the Associations, this agreement shall terminate and the parties automatically be bound by the terms of such Association agreement and a full agreement embodying such terms shall be executed by the Employer and the Union. However, the wages due and payable and other conditions of employment as set forth in this Agreement shall not be affected for the periods in effect prior to the date of the Association contract.

6. The parties agree to incorporate this Agreement in a full contract if so requested by the Union.

For the Employer

/s/ [Illegible]
Hudik-Ross Co., Inc.
251 W. 42nd St.
NY, NY 10036
For The Enterprise
Association
Local 638

By /s/ John J. Tracey
Business Agent at Large

Dated July 1, 1972

DEFENDANT'S EXHIBIT B

ENTERPRISE ASSOCIATION

Of Steam, Hot Water, Hydraulic, Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning and General Pipe Fitters of New York and Vicinity

A.F.L.-C.I.O.

STEAMFITTERS LOCAL UNION 638
OF THE UNITED ASSOCIATION

[Union Label 285]

SECRETARY'S OFFICE
841 BROADWAY
New York, N.Y. 10003
Phone ORegon 4-3937

MEETS AT
ROOSEVELT AUDITORIUM
100 East 17th Street
New York City, N.Y.

The undersigned hereby agrees to continue in force the Working Agreement that expired on June 30, 1969 with the following modifications, it being understood that this Agreement will be continued until a more formal and detailed agreement is drawn and executed.

All the Articles and Rules enumerated in said Working Agreement are to remain the same except Rules II, (Wages), XXIII, (Surety Bond) and XXIV, (Industry Promotional Fund). A new Rule, XXV, (New York City Building and Construction Industry Board of Urban Affairs Fund) will be added.

From July 16, 1969 to December 31, 1969, inclusive, regular time for a steamfitter shall be paid for at the rate of $6.31 per hour plus 6% Welfare, 7% Pension, 9% Vacation, 50¢ per hour Security Benefit Fund, 3¢ per hour Educational Fund, 3¢ per hour Industry Promotional Fund and 1¢ per hour Industrial Board of Urban Affairs. (See Rules XVIII, XIX, XX, XXI, XXII, XXIV, and new Rule XXV).

Thereafter, from 1-1-70 to 7-1-70, inclusive, the Employer shall pay an additional 45¢ per hour to cover Wages and Fringe Benefits.

From 7-2-70 to 12-30-70, inclusive, the Employer shall pay an additional 50¢ per hour to cover Wages and fringe benefits.

From 12-31-70 to 6-30-71, inclusive, the Employer shall pay an additional 60¢ per hour to cover Wages and fringe benefits.

From 7-1-71 to 12-29-71, inclusive, the Employer shall pay an additional 65¢ per hour to cover Wages and fringe benefits.

From 12-30-71 to 6-30-72, inclusive, the Employer shall pay an additional 65¢ per hour to cover Wages and fringe benefits.

The usual percentage of the Steamfitter's Wage plus Fringe Benefits will be paid for the operation and/or maintenance of temporary heat and in the employment of Apprentices.

Rule XXIII is modified to require Employer to make Fringe Benefit payments within 14 days after they become due and if any Employer is delinquent in making these payments, he will be required to post a $10,000.00 bond; in addition, he will be required to pay a late charge at a rate of interest to be agreed upon by the parties hereto and such Employer will be required to produce his payroll records for an audit so that a verification of the correct amount due may be obtained.

Rule XXIV will be jointly administered when Federal Law so permits.

Rule XXV (new). A new Fund will become part of this agreement, said Fund to be known as the New York City Building and Construction Industry Board of Urban Affairs Fund.

The term of this agreement shall be three (3) years and no change will be asked by either party hereto, to take effect before July 1, 1972, except that from January 1, 1970 through the term of this agreement, the parties will agree to the allocation of the increases mentioned herein, all of which shall be incorporated in the more

formal agreement to be drawn and executed by the parties.

ENTERPRISE ASSOCIATION
LOCAL UNION 638

BY: /s/ Hudik-Ross Co., Inc.

/s/ John J. Tracey
B.A. at Large

/s/ [Illegible]
Employer

July 16, 1969

SUPREME COURT OF THE UNITED STATES

No. 75-777

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638, ETC.

ORDER ALLOWING CERTIORARI. Filed February 23, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 206293 247

No. 75-777

Supreme Court, U. S.
FILED
JAN 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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Of Counsel:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

The Respondent opposes the petition for certiorari for the reasons to be presented.

Opinion Below

By its judgment and order the United States Court of Appeals for the District of Columbia has remanded this case to the National Labor Relations Board for further

proceedings. Petitioner's Brief for Certiorari, Appendix B at 137a-138a.[1]

Questions Presented

Whether the Supreme Court should grant certiorari in this case where the judgment and order of the United States Court of Appeals is not final.

Whether, when an employer and the union representing his employees enter into a collective bargaining agreement containing a valid "work preservation" provision, and thereafter the employer enters into a business contract on terms proposed by the other party which requires him to violate that provision, the union engages in a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. §158(b)(4)(ii)(B), when, in the absence of an applicable no-strike clause, it induces the employees of that employer to refuse to work on prefabricated goods which are being utilized by him in violation of the collective bargaining agreement.

Counterstatement of the Case

There is no factual issue in this case, nor is there any question about the sufficiency of the evidence. The Respondent (Local 638 or the Union) entered into a valid collective bargaining agreement with Hudik-Ross Company, Inc. (Hudik) containing a valid "work preservation" provision. Thereafter Hudik, in order to gain a business contract,

[1] All further page references are to the Appendices to Petitioner's Brief for Certiorari unless otherwise noted.

accepted terms which required Hudik to violate that provision of its agreement with the Union. The collective bargaining agreement did not preclude a strike in response to such a violation and Local 638 asked the employees it represented under its own collective bargaining agreement with Hudik not to work for Hudik only insofar as their labor would amount to an acceptance of the violation of the labor agreement under which they were employed.

Local 638 never induced or attempted to induce any employee, other than the employees it represented under its collective bargaining agreement with Hudik, to do anything. There was no picket line. There was no attempt to organize any employee. No employee of any other employer ever refused or failed to work. No person was ever asked to cease doing business with any other person.

The National Labor Relations Board (NLRB) did not find a "surrounding circumstance," but held that the Union violated one of the secondary boycott provisions of the National Labor Relations Act (NLRA or the Act) *solely* because Hudik, the employer of the employees represented by Local 638, could not enter into a new business contract on the terms proposed, without violating the "work preservation" provisions of its collective bargaining agreement.

REASONS FOR DENYING THE WRIT

A. The Order Below Is Non-Final

Supreme Court review should not be had, at least at this stage of the proceedings, as such review may serve only to affirm the Court of Appeals order to remand the case to the NLRB for further hearings. Subsequent action by the

NLRB may make review by this Court unnecessary, or may alter the issues so that neither party may desire review.

All of the usual reasons which have persuaded this Court of the wisdom of its general policy to deny petitions from non-final judgments and orders, such as the conservation of judicial resources, are applicable in this case. There are no extraordinary circumstances to remove this matter from the application of the rule. The work in question was completed years ago. Time is not a factor. We ask this Court to follow its general practice and deny the petition for certiorari from the non-final order. *Brotherhood of Locomotive Firemen and Enginemen et al.* v. *Bangor & Aroostock Railroad Co. et al.*, 389 U.S. 327 (1967); *see Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Company*, 240 U.S. 251, 257-258 (1916).

However, should this Court grant certiorari, we request that it render a final determination. We believe the record before the NLRB is dispositive of the three "issues" (*see* Petitioner's Brief for Certiorari at 7, n. 2) for which remand has been ordered.

The intention of the parties as to the scope of the applicable clause in the collective bargaining agreement, the first remand issue, is determined by the language of the agreement. There is nothing to support an inference or argument, and none was made by the charging party or by the General Counsel, that the language means anything other than what it reads, or that it was intended to be applied more narrowly than it actually was.

Whether Hudik "knowingly" violated his collective bargaining agreement, the second remand issue, has already been found in the affirmative. This Court is respectfully

referred to the finding of the Administrative Law Judge (ALJ) (Appendix C at 148a and at 148a-149a, n. 3) and to the order of the NLRB (Appendix C at 139a) where the finding of the ALJ is affirmed.

Whether Local 638 was trying to organize the employees of Slant/Fin Corporation, the third remand issue, has already been found in the negative by the ALJ (Appendix C at 125a) and that finding was also affirmed by the NLRB (Appendix C at 139a).

The order below is non-final and the case is not ripe for review.

B. This Court Has Spoken on the Issue and Further Decision Is Not Required

In *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, *rehearing denied* 387 U.S. 926 (1967), this Court specifically held that a work preservation clause similar to the one in the instant case was legal. 386 U.S. at 645-646. The ALJ and the NLRB both found that the clause in the collective bargaining agreement in this case is valid. There is no issue concerning its validity.

In *National Woodwork, supra,* this Court specifically held that the employees refusal to work in violation of the work preservation clause in their own collective bargaining agreement was not a violation of Section 8(b)(4)(B) of the Act. 386 U.S. at 646. This Court wrote that its holding could not "be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically

calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at 644-645 (footnotes omitted).

Contrary to the current assertion by the Solicitor General, at p. 8 of the petition, the question in this case was not expressly reserved by this Court. In *National Woodwork, supra,* 386 U.S. at 616-617 n. 3 this Court noted that the specific issue was not before it, but this Court did not use any language indicating that it was reserving the question and that its reasoning in *National Woodwork* should not, therefore, be applied to the fact pattern in this case. Indeed, the Solicitor General in his memorandum to this Court in *J. L. Simmons Co., Inc.* v. *Local 742, Carpenters,* 404 U.S. 986 (1971) expressed the view that this Court's approach and reasoning in *National Woodwork* applied equally whether the employer's breach of his collective bargaining agreement was self-motivated or was in response to the demands of another businessman.

That understanding of *National Woodwork* by the Solicitor General in 1971 is the understanding of five Circuit Courts (Appendix A at 3a) including the Court below which wrote:

> ". . . the reasoning underlying the *National Woodwork* decision *compels* the conclusion that an employer's lack of legal control over the work the union seeks to preserve for its members cannot alone be decisive of the legality of the union's objectives." Appendix A at 16a (footnote omitted, emphasis added).

The NLRB points to only one factual difference between this case and *National Woodwork.* In the instant case Hudik intentionally breached the work preservation provision of its collective bargaining agreement in order to gain a business contract on terms proposed by another. In *National Woodwork* Frouge intentionally breached the work preservation provision of its collective bargaining agreement for a business reason; but its violation was not for the purpose of meeting business terms proposed by another. Petitioner's Brief for Certiorari at 11.

In the instant case the NLRB did not find any "remoteness of the threat of displacement by the banned product," or anything in "the history of labor relations between the union and the employers who would be boycotted," or anything in "the economic personality of the industry" (*see National Woodwork, supra,* 386 U.S. at 644 n. 38) or any other "surrounding circumstance" to evidence that Local 638's limited conduct was tactically calculated to satisfy union objectives elsewhere. It ascertained only that Hudik could not have gained a business contract without intentionally violating its collective bargaining agreement while Frouge's violation was not so motivated.

The above difference does not rise to the level of a legal distinction. Both *National Woodwork* and this case are equally covered by the same overriding principles of law. There is no basis in reason or law for the same union activity in the same circumstances to lose its protection and be prohibited solely because the employer's violation of his collective bargaining agreement is in one instance motivated by his desire to enter into a business contract on terms proposed by another business enterprise while, in the other, it is also motivated for business advantage, but it is self-

motivated. Indeed, although it is not necessary for the purposes of this case, it appears from the decisions of this Court that a strike limited so as to be only a response to an employer's intentional violation of a collective bargaining agreement is, in the absence of an applicable no-strike clause, not only protected concerted activity, *cf. Boys Market, Inc.* v. *Retail Clerk's Union, Local 777,* 398 U.S. 235 (1970); but also a specially protected "unfair labor practice" strike. *See Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, *rehearing denied* 351 U.S. 980 (1956).

It is Hudik, the employer, not Local 638, which is the culprit here. As the Court below wrote:

> "The Board's right to control doctrine is a continuing attempt to circumvent the congressional proviso and is inconsistent with the Court's analysis in *National Woodwork.* Moreover, it is a continuing inducement for employers to violate their bargaining agreements. If employers do not want work preservation clauses to cover prefabricated units, they should not sign bargaining agreements with such clauses unless they so state. And when an employer gets himself into a bind, as did Hudik-Ross, he should arbitrate or negotiate his way out. Having the Board bail him out is to demean the National Labor Relations Act by encouraging deliberate, if not always planned, violations of bargaining agreements." Appendix A at 34a-35a (footnote omitted).
>
> "Hudik-Ross could have totally avoided the labor dispute merely by honoring its bargaining agreement and not bidding on a contract which required it to breach the valid work preservation provision it had negotiated with the union. Thus, to accept the Board's characterization of Hudik-Ross as a neutral bystander under these circumstances would allow the 'Cinderella-like transformation of an obviously involved party,' and would both render nugatory the commitment which Hudik-Ross made and demean the collective bargaining process which is the cornerstone of labor relations in the United States." Appendix A at 20a-25a (footnotes omitted).

This Court has repeatedly found that "the National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB* v. *American National Insurance Co.,* 383 U.S. 395, 401-402 (1952); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1937); *East Bay Union of Machinists, Local 1304, etc.* v. *NLRB,* 322 F.2d 411, 414 (D.C. Cir. 1963), *aff'd sub nom. Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964).

And more recently citing *NLRB* v. *American National Insurance Co., supra,* the United States Court of Appeals for the District of Columbia found that "the obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace." *International Union of Electrical Radio and Machine Workers* v. *NLRB,* 426 F.2d 1243, 1249 (D.C. Cir. 1970), *cert. denied* 400 U.S. 950 (1970) (citation omitted).

This basic policy of the Act and of the Labor Management Relations Act, stated at 29 U.S.C. §§151 and 141(b) respectively, is supplemented by provisions defining collective bargaining (29 U.S.C. §158(d)) and by making it an unfair labor practice to refuse to bargain in good faith. 29 U.S.C.

§§158(a)(5) and 158(b)(3). The duty to bargain in good faith has been held to include the obligation to refrain from unilaterally modifying wages, hours or working conditions of employees during the term of a collective bargaining agreement even if done without anti-union animus, *NLRB* v. *C&C Plywood Corp.*, 385 U.S. 421, *rehearing denied* 386 U.S. 939 (1967); *see Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Company, Chemical Division, et al.*, 404 U.S. 157 (1971); and the duty, continuing during the term of a collective bargaining agreement, to provide relevant information to the other party to the agreement. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967).

Hudik's violation was a straightforward, intentional breach committed because it could not comply with the collective bargaining agreement and, at the same time, meet the terms of a proposed business contract. Such intentional violation without even an offer of negotiation destroys collective bargaining just as surely as does a unilateral change in wages, hours or working conditions, *NLRB* v. *Katz*, 369 U.S. 736 (1962), or the failure to provide information. *NLRB* v. *Acme Industrial Co., supra.* Indeed it is difficult to contemplate anything more destructive of collective bargaining, and of the industrial peace that it is intended to promote, than the intentional violation of agreements already reached.

In short, this case is turned on its ear. It appears from the decisions of this Court that the employer's conduct, not the union's, constituted an unfair labor practice.

It is respectfully submitted that prior decisions of this Court have already determined the issue: in the absence of an applicable non-strike clause a refusal to work on

prefabricated goods by employees whose employer is utilizing such goods in breach of their collective bargaining agreement is concerted actively protected by Sections 7, 13, and the proviso to Section 8(b)(4)(B) of the NLRA (29 U.S.C. §§157, 163 and 158(b)(4)(B). The strike is not transmutted into conduct prohibited by Section 8(b)(4)(ii)(B) of the Act solely because the employer's breach was motivated by his desire to enter into a business contract on terms proposed by the other business.

This Court, having already addressed itself to the underlying issues, should deny certiorari now as it did when the same issues were raised in 1971. *J. L. Simmons Co., Inc.* v. *Local 742, Carpenters,* 404 U.S. 986 (1971).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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Respondent suggests (Br. in Opp. 2-5) that because the court of appeals remanded this case to the Board, its judgment is "non-final" and not appropriate for review by this Court. However, respondent then proceeds to argue (Br. in Opp. 4) that the remand would serve no useful purpose, and that the issue presented by the petition is, indeed, ripe for adjudication by this Court at this time.

The court of appeals indicated (see Pet. 7, n. 2) that, on remand, the Board would be free to consider (1) whether

the work preservation clause in Hudik's contract was intended to cover the work here at issue; (2) whether Hudik knowingly entered into the subcontract in contravention of its preexisting bargaining agreement; and (3) whether the Union was in fact trying to organize Slant/Fin's employees. However, as respondent points out (Br. in Opp. 3), the language of the work preservation clause is broad enough to cover the work in dispute, all parties before the Board so assumed, and the Board so assumed in arriving at its decision.[1] As to the remainder of the remanded issues, the Administrative Law Judge, in findings that the Board did not disturb, concluded that Hudik was aware of the Austin specifications prior to making its bid and at the time it executed the subcontract (Pet. App. 148a, and n. 3), and that there is no evidence that the Union was trying to organize Slant/Fin's employees (Pet. App. 152a). A remand therefore would serve no useful purpose.[2]

---

[1]The Administrative Law Judge expressed the opinion (Pet. App. 155a) that "the instant contract between Hudik and the Union, in providing that pipe would be cut and threaded on the job, necessarily implied that it referred to pipe within Hudik's control and which could be cut on the job." However, his ensuing analysis (Pet. App. 155a-164a) shows that this view was "not a major basis of [his] decision" (Pet. App. 155a). Moreover, the Board's decision (Pet. App. 140a-142a) reflects an assumption that the work preservation clause covered the disputed work.

[2]Moreover, the remand was necessitated only by the court of appeals decision upon the legal issue presented in the petition. If the court of appeals' judgment is reversed, this case will come to an end immediately. We submit that the judgment possesses sufficient finality that review is both appropriate and necessary. See, *e.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-487; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3.

For these reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 1a–136a) is reported at 521 F.2d 885. The decision and order of the National Labor Relations Board (Pet. App. 139a–172a) is reported at 204 NLRB 760.

JURISDICTION

The judgment of the court of appeals (Pet. App. 137a–138a) was entered on July 1, 1975. On September 18, 1975, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including November 28, 1975. The petition was filed on that date and was granted on February 23, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a union engages in an unlawful secondary boycott within the meaning of Section 8(b)(4)(B) of the National Labor Relations Act when it causes, and threatens to cause, employees of a firm with which the union has a collective bargaining agreement containing a "work preservation" clause to refuse to handle prefabricated goods that their employer's contract with a general contractor obliges the employer to install.

STATUTE INVOLVED

Section 8(b) of the National Labor Relations Act, 61 Stat. 141, as amended, 29 U.S.C. 158(b), provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents——
>
> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is——
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
>
> * * * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Austin Company, Inc. (Austin), was the engineer that prepared the specifications for construction of the Norwegian Christian Home for the Aged

in Brooklyn, New York (the Home) (Pet. App. 139a–140a). The specifications called for the use of climate control units manufactured by Slant/Fin Corporation. Slant/Fin was to cut, thread, and install at the factory the internal piping on these units, which carried a one-year warranty contingent on factory fabrication of the internal piping (*id.* at 140a, 157a; A. 54–57, 77). Austin, acting as the general contractor for the project, awarded a subcontract for plumbing work to Hudik-Ross Company, Inc. (Hudik). This subcontract, which was awarded by competitive bidding, called for Hudik to perform the heating, ventilating and air conditioning work for the Home—including, as Hudik knew, installation of the Slant/Fin units (Pet. App. 140a, 148a).

Hudik had a collective bargaining agreement with Local 638 of the Plumbers and Steamfitters (the Union). Rule IX of this agreement provided that Hudik's steamfitter employees would cut and thread certain piping by hand on the jobsite. Shortly after the Slant/Fin units, which had been purchased by Austin, arrived on the jobsite, the Union's business agent told Austin's project superintendent that the Union's members would not install the units "because the piping inside the units was steamfitters' work" (Pet. App. 150a; see also *id.* at 140a–141a) and that Rule IX of their contract with Hudik called for them to do the inside piping work on the site. The business agent told Hudik the same thing, and Hudik's employees did not install the units (*id.* at 150a–151a).

Austin filed unfair labor practice charges with the Board (*id.* at 143a).[1]

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Union's refusal to install the Slant/Fin units was a secondary boycott, in violation of Section 8(b)(4)(B) of the National Labor Relations Act (the Act), 61 Stat. 141, as amended, 29 U.S.C. 158(b)(4)(B).[2] The Board stated (Pet. App. 141a–142a, 171a):

> We note that [the] refusal of the [Union] to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, the subcontractor, and was for the purpose of preserving work they had traditionally performed. However, Hudik was incapable of assigning its employees this work; such work was never Hudik's to assign in the first place. Moreover, we note that the [Union] informed Austin, who did not employ employees represented by the [Union] and had no agreement with that Union, that it would not let Hudik install the climate control units involved. Con-

[1] The Board sought and obtained an injunction under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), requiring the Union to desist from its boycott of the Slant/Fin units. In response to the injunction Hudik's employees installed the units.

[2] The Board followed its earlier decision in *Local Union No. 438, United Association (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), enforced *sub nom. George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F.2d 323 (C.A. 4), which involved a similar situation.

> sidered together these facts clearly indicate that the [Union] was exerting prohibited pressure on Hudik with an object of either forcing a change in Austin's manner of doing business or forcing Hudik to terminate its subcontract with Austin. Since the pressure exerted by the [Union] on Hudik was undertaken for its effect on other employers, this pressure was secondary and prohibited by Section 8(b)(4)(B). [Footnote omitted.]

The Board ordered the Union to cease engaging in such unlawful conduct (*id.* at 165a–167a).

C. THE COURT OF APPEALS' DECISION

The court of appeals, sitting *en banc* and dividing five to four, remanded the case to the Board. The court, reaffirming two prior panel decisions,[3] held that the Board's reliance upon Hudik's lack of power to assign the disputed work to its employees as the decisive factor was contrary to the principles enunciated in *National Woodwork Manufacturers Association* v. *National Labor Relations Board,* 386 U.S. 612.

The court observed that *National Woodwork* had held that the determination whether a work preservation clause and its enforcement violate Section 8(b)(4)(B) requires (Pet. App. 14a):

> an "inquiry into whether, under *all the surrounding circumstances,* the Union's objective was preservation of work for [the struck employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. * * * *The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting* [*struck*] *employer vis-a-vis his own employees.*" [Emphasis, quote and brackets added by court of appeals; quoting from 386 U.S. at 644–645.]

This passage from *National Woodwork* persuaded the court of appeals' majority that the Union's activity here was primary. Since Hudik had executed a contract with the Union requiring it to preserve internal piping work for its employees, the court of appeals held that it could not "be considered a neutral bystander" when its employees struck to force it to honor that commitment (Pet. App. 40a).[4]

[3] *Local 742, Carpenters* v. *National Labor Relations Board,* 444 F.2d 895, certiorari denied *sub nom. J. L. Simmons Co.* v. *Local 742, Carpenters,* 404 U.S. 986; *Local 636, Plumbers* v. *National Labor Relations Board,* 430 F.2d 906.

[4] The court remanded the case to the Board, holding that the Board would be free to reconsider (1) whether the work preservation clause in Hudik's contract, viewed in the light of the custom and tradition of the industry, was intended to cover the work here at issue (Pet. App. 20a–24a, n. 25); (2) whether Hudik "knowingly entered" into the subcontract "in contravention" of its preexisting bargaining agreement (*ibid.*); and (3) whether the Union was in fact trying to organize Slant/Fin's employees (*id.* at 44a, n. 46). The court added that the Board also could consider Hudik's lack of control over assignment of the work as one factor in determining the Union's objective, but not "to the total exclusion of the circumstances which the *National Woodwork* Court stated might be relevant to the inquiry into the union's objective" (*id.* at 44a).

We agree with respondent (Br. in Opp. 4) that such a remand would serve no useful purpose. As respondent points out (Br. in Opp. 3), the language of the work preservation clause is broad enough to cover the work in dispute, all parties before the Board so assumed, and the Board so assumed (Pet. App. 141a) in arriving

(Continued)

The dissenting judges concluded that the Board had considered all of the relevant circumstances, and that those circumstances fully supported the Board's conclusion that the Union was pursuing an illegal secondary objective. They argued (Pet. App. 113a–115a; footnotes omitted):

> The majority rejects as inherently sophistical the notion that * * * employers [such as Hudik] can ever be termed neutral: in their eyes Hudik * * * has actively violated an understanding for which the Union bargained collectively, and the Union's dispute is clearly with Hudik. But the Labor Board takes a more refined and realistic view of the situation. The Board insists that the Union's true complaint is with the predilection of architects, engineers and general contractors for factory-designed and -assembled goods. The Board * * * simply

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(Continued)
at its decision. The Administrative Law Judge expressed the opinion (Pet. App. 155a) that "the instant contract between Hudik and the Union, in providing that pipe would be cut and threaded on the job, necessarily implied that it referred to pipe within Hudik's control and which could be cut on the job." However, his ensuing analysis (Pet. App. 155a–164a) shows that this view was "not a major basis of [his] decision" (Pet. App. 155a). Moreover, the Board's decision (Pet. App. 140a–142a) reflects an assumption that the work preservation clause covered the disputed work. See also the opinion of the court of appeals (Pet. App. 6a).

As to the remainder of the remanded issues, the Administrative Law Judge, in findings that the Board adopted (Pet. App. 139a), concluded that Hudik was aware of the Austin specifications prior to making its bid and at the time it executed the subcontract (Pet. App. 148a and n. 3), and that there is no evidence that the Union was trying to organize Slant/Fin's employees (Pet. App. 152a).

> recognizes as one factor influencing its decision that the policy of using prefabricated goods, and the power to compel their use, belong to the general contractor and not to the subcontractor. Thus, the Union's dispute cannot logically be solely with the subcontractor, but must instead be also with the party who dictates that prefabricated products shall be employed: the owner, the designer, the general contractor.

SUMMARY OF ARGUMENT

This Court has made it clear that Section 8(b)(4)(B) of the National Labor Relations Act is designed to foster "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. In *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, the Court held that, in making this accommodation in a situation where the union exerts strike pressure against an employer assertedly for the purpose of preserving work for the employer's employees, the relevant inquiry is whether, "under all the surrounding circumstances, the Union's objective was preservation of work for [the struck employer's] employees, or whether [its actions] were tactically calculated to satisfy union objectives elsewhere" (*id.* at 644).

The facts in *National Woodwork* supported the Board's conclusion that the union's object was primary when it refused to permit its members (employed by Frouge, a general contractor) to install prefabricated doors. Finishing doors was work that Frouge's employees traditionally had performed on the jobsite. And the collective bargaining agreement between Frouge and the union provided that Frouge's employees would not be required to handle doors that had been finished off the jobsite. The strike occurred when Frouge nevertheless ordered such doors, although it was not required to do so by its contract with the project owner.

The Board has reached a contrary conclusion in this case, and the difference in result is supported by critical differences of fact. Frouge was free to decide whether or not to use prefabricated doors. But here Austin, the project engineer, required the installation of prefabricated climate control units. The Union placed pressure not on Austin (whose employees it did not represent) but on Hudik, thus seeking work that Hudik never possessed or had a right to obtain. In these circumstances, the Board appropriately applied its "right to control" test. *Ohio Valley Carpenters District Council* v. *National Labor Relations Board,* 339 F.2d 142, 145 (C.A. 6).

Confronted by the demands of its employees, Hudik had available only two courses of action: it could have induced Austin to change its requirements and specifications for the job or, failing that, it

could have terminated its contract with Austin. The second course (like a refusal to bid on the job initially) would not have preserved or produced work for Hudik's employees. The first course could have produced work for Hudik's employees only if Austin could have been induced to buy units that did not have prefabricated internal piping. Hence, as the dissenting opinion in the court of appeals observed (Pet. App. 83a), "the pressure created by the Hudik employees' boycott of the Slant/Fin units must have been directed at Austin and Slant/Fin as they were the only parties with the power to satisfy the demand that the work be taken from Slant/Fin employees and reassigned to the Union."

This analysis is consistent with the principles enunciated in *National Woodwork.* In that case the union could have accomplished its design by changing the decision of Frouge alone. In the present case the Union's efforts could not have succeeded without changing Austin's decision as well as Hudik's. It was proper, therefore, for the Board to conclude that, while the object of the union pressure on Frouge was solely work preservation, at least *an* object of the pressure on Hudik was "to satisfy union objectives elsewhere." *National Woodwork, supra,* 386 U.S. at 644.

The situation here has important features in common with *Denver, supra,* and *National Labor Relations Board* v. *Local 825, Operating Engineers,* 400

U.S. 297. In those cases the union pressure was found to be secondary because it was exerted against an entity that lacked power to grant the union's ultimate demand and could aid the union only be ceasing to do business with, or forcing a change in the policies of, a third party. The principle is the same, and the result should be the same, whether the general contractor or the subcontractor is involved. It is unimportant that the Union may have had a dispute with Hudik over the working conditions of its employees. The fact remains that the dispute was created by Austin's decision and that Hudik was powerless to resolve it; the Union's pressure on Hudik therefore must have included at least one secondary objective—to change Austin's decision to specify Slant/Fin units.

It is true, of course, that Hudik's agreement with the Union contained a "work preservation clause" that arguably enlists Hudik as the Union's willing agent in obtaining the disputed work for the Union. But the parties cannot by contract convert into lawful primary activity that which the statute makes secondary. *Local 1976, Carpenters* v. *National Labor Relations Board,* 357 U.S. 93, 104–105. The Union's pressure, an object of which was to affect Austin's decision (or, at a minimum, Hudik's business relationship with Austin), does not become primary merely because Hudik may have promised to help the Union pursue this secondary object.

ARGUMENT

A UNION ENGAGES IN A SECONDARY BOYCOTT VIOLATING THE NATIONAL LABOR RELATIONS ACT WHEN IT EXERTS STRIKE PRESSURE AGAINST AN EMPLOYER TO OBTAIN WORK THAT THE EMPLOYER NEITHER POSSESSED NOR HAD A RIGHT TO OBTAIN

A. THE NATIONAL LABOR RELATIONS ACT FORBIDS UNION PRESSURE UPON AN EMPLOYER IF THE UNION HAS A "SECONDARY" OBJECTIVE

This Court has made it clear that Section 8(b)(4)(B) of the National Labor Relations Act is designed to foster "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 692; *National Woodwork Manufacturers Association* v. *National Labor Relations Board,* 386 U.S. 612, 626–627. The task of achieving these dual objectives is fraught with difficulties, not the least of which is the fact that the distinction between legitimate "primary" activity and illegal "secondary" activity is rarely "a glaringly bright line." *Local 761, Electrical Workers* v. *National Labor Relations Board,* 366 U.S. 667, 673.

Union activity is secondary if an object of the activity is to force a cessation of, or change in, business relations between two entities. *Denver, supra,* 341 U.S. at 688; *National Labor Relations Board* v.

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Local 825, Operating Engineers, 400 U.S. 297, 305. On the other hand, the objectives of even primary activity "include a desire to influence others" to withhold "their services or trade" (*Electrical Workers, supra,* 366 U.S. at 673) from the employer against whom such activity is directed. And some union activity will have both a primary object and a secondary object. In that event the activity is unlawful, for Section 8(b)(4) proscribes activity if "an" object is secondary,[5] a principle the court of appeals recognized (Pet. App. 41a).

The task of drawing the line between primary and secondary activity is particularly difficult where, as here, economic pressure is exerted at a construction project where a number of independent firms are working together.[6] The use of a prefabricated product may diminish or extinguish the need for work that employees of one of the firms have traditionally performed on the jobsite. The effect on the employees may be as great as if their employer had contracted out the disputed work. Cf. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203. On the other hand, the decision whether to use a particular product may lie not with the employees' employer, but with third parties over which it has no control.

[5] See also *Denver, supra,* 341 U.S. at 689.

[6] The fact that the contractors are engaged on the same project and that the general contractor may have some supervision over their work does not "eliminate the status of each as an independent contractor or make the employees of one the employees of the other." *Denver, supra,* 341 U.S. at 689–690.

Deciding whether a dispute is primary or secondary usually requires an accommodation of these competing principles. When the Board confronted this problem in a work preservation dispute, it concluded that the language of Section 8(b)(4) could not be taken at its broadest literal sweep, and that a union, attempting to preserve for its members work they had traditionaly performed, could strike in an attempt to influence the employer's decisions. Such a strike might have an object of "forcing [the employer] * * * to cease using [or] handling * * * the products of" another firm, but it was "primary" activity not forbidden by the Act. *Milk Wagon Drivers Union, Local No. 603 (Drive-Thru Dairy),* 145 NLRB 445, 449. See also *Retail Clerks Union, Local No. 170* v. *National Labor Relations Board,* 296 F.2d 368, 373–374 (C.A.D.C.).

The Board concluded that the case would be different if the employer against which the union's pressure was exerted lacked the power to comply with the union's demands. *Clifton Deangulo and Local Union No. 98, Sheet Metal Workers (York Co.),* 121 NLRB 676, 685–686. Under the Board's test, "if a union demands that a contractor do something he is powerless to do except by ceasing to do business with somebody not involved in the dispute, it is manifest that an object of the Union is to induce this cessation of business"; it is "reasonable to hold that the object of the union was not an impossible act but was the alternative possible." *Ohio Valley Carpenters District Council* v. *National Labor Relations Board,*

339 F. 2d 142, 145 (C.A. 6). The Board also concluded that the presumption that the union's pressure in such circumstances is secondary can be rebutted. The dispute would be primary, for example, if the struck employer itself instigated its loss of power over the work in dispute.[7]

The Board's approach initially found widespread acceptance in the courts of appeals. Every court of appeals that considered the question held that the Board properly characterized as presumptively secondary pressure directed against an employer that lacked the power to provide its employees with the work they sought.[8] The test was forecast in the House Report on the 1947 amendments to the Act; the report indicates that it was the intention of Congress to proscribe boy-

[7] *Pipe Fitters, Local No. 120 (The Spohn Corp.)*, 168 NLRB 991, 992 (1967); *Painters District Council No. 20 (Uni-Coat Spray Painting, Inc.)*, 185 NLRB 930, 932 (1970). See also Pet. App. 110a–111a. The court of appeals expressly disapproved the use of the right to control even as a *prima facie* test. See Pet. App. 7a–12a, n. 9, 16a–17a. See also *Local 742, Carpenters* v. *National Labor Relations Board*, C.A.D.C., No. 73–1120, decided March 4, 1976, slip op. 15.

[8] See *Local 636, United Association* v. *National Labor Relations Board*, 278 F.2d 858, 864 (C.A.D.C.); *Local 5, United Association* v. *National Labor Relations Board*, 321 F.2d 366, 369 (C.A.D.C.), certiorari denied, 375 U.S. 921; *National Labor Relations Board* v. *Enterprise Association, Local 638, United Association*, 285 F.2d 642, 645 (C.A. 2); *National Labor Relations Board* v. *I.L.A., Local 1694*, 331 F.2d 712, 716–717 (C.A. 3); *Ohio Valley Carpenters District Council* v. *National Labor Relations Board*, 339 F.2d 142, 145 (C.A. 6); *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 354 F.2d 594, 597 (C.A. 7), reversed in part on other grounds, 386 U.S. 612. See also *American Boiler Manufacturers Association* v. *National Labor Relations Board*, 366 F.2d 815, 822 (C.A. 8).

cotts where "the employers are powerless to comply with demands giving rise to the [boycotting] activities * * *." H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, p. 314 (1958).[9]

B. *NATIONAL WOODWORK* INDICATES THAT "WORK PRESERVATION" DISPUTES CAN BE EITHER PRIMARY OR SECONDARY, DEPENDING UPON THE CIRCUMSTANCES

In *National Woodwork* this Court reviewed part of the Board's interpretation of Section 8(b)(4). It approved the Board's view. It is ironic that the court of appeals now has held that the Court's approval in *National Woodwork* of part of the Board's accommodation of the competing principles spelled the doom of the rest of its policy.

The issue in *National Woodwork* was whether the union had engaged in an unlawful secondary boycott by refusing to permit its members, employed by Frouge, a general contractor, to install prefabricated doors. Finishing doors was work that Frouge's employees had traditionally performed on the jobsite. The collective bargaining agreement between Frouge and the union provided that its employees would not be required to handle doors that had been finished off the jobsite. The employees struck when Frouge nevertheless ordered such doors, although Frouge was not required to do so by its contract with the project owner.

[9] The remainder of the legislative history is inconclusive at best. The competing policy considerations that led to the adoption of Section 8(b)(4) have been fully canvassed in the three opinions in *National Woodwork* and in the dissenting opinion below (Pet. App. 88a–96a).

The Court stated that the determination whether the "will not handle" clause of the collective bargaining agreement, and its enforcement, were unlawful "cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's object was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.[10] Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would * * * become secondary" (386 U.S. at 644–645, footnote omitted). Applying this test, the Court held that the objective of the "will not handle" clause "was preservation of work traditionally performed by the jobsite carpenters," making the clause itself a lawful work preservation agreement, and that the facts established[11] that the union's object in invoking that clause against Frouge was "*solely* [the] preservation of the traditional tasks of the jobsite carpenters" (*id* at 646; emphasis added).

The Court recognized that determining whether the union's objective was preservation of work for the employees of the struck employer, or the satisfaction of union objectives elsewhere, "will not always be a simple test to apply" (386 U.S. at 645). Indeed, Mr. Justice Harlan, whose vote was necessary to establish a majority of the Court for any disposition, concurred on the ground that the facts showed that "the contractual restrictive-product rule in question, and the boycott in support of its enforcement, had as their sole objective the protection of union members from a diminution of work" they "traditionally had performed * * * on the jobsite" (*id.* at 648). He observed that *National Woodwork* was "not a case of a union seeking to restrict * * * an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs" (*ibid.*).

[10] The Court emphasized that there "need not be an actual dispute with the boycotted employer * * * for the activity to fall within this category" (386 U.S. at 645).

[11] The "Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union" (386 U.S. at 646).

C. UNDER THE PRINCIPLES OF *NATIONAL WOODWORK* AND OTHER CASES THE UNION'S PRESSURE HERE HAD A SECONDARY OBJECTIVE

These principles support a different balance when the struck employer lacks the right to control the assignment of the disputed work. In contrast to Frouge, which was free to decide whether or not to use prefabricated doors, Hudik was obligated by its contract with Austin to install prefabricated climate control units. By demanding that Hudik's employees perform on the jobsite the internal piping work on climate control units, the Union was seeking work that Hudik never possessed and did not have

a right to obtain.[12] The Board, applying its "right to control" test, concluded that this circumstance made an important difference.[13]

Confronted by the demands of its employees, Hudik had available only two courses of action: it could have induced Austin to change its requirements and specifications for the job or, failing that, it could have terminated its contract with Austin.[14] The second

[12] Hudik's position was similar to that of the three contractors referred to in footnote 3 of the Court's opinion in *National Woodwork*, *supra*, 386 U.S. at 616, n. 3. These contractors, unlike Frouge, did not have "control" over the work which the union sought to preserve for its members. The court of appeals sustained the Board's finding that the union's pressure on them therefore was secondary and unlawful. 354 F.2d 594, 598–599 (C.A. 7). The union did not seek review of that ruling, and hence it was not before the Court in *National Woodwork*.

[13] The Board's position in this regard has been consistent since it decided *Deangulo*, *supra*. See, *e.g.*, *Local 5, United Association (Arthur Venneri Co.)*, 137 NLRB 828 (1962); *International Longshoremen's Association (The Board of Harbor Commissioners)*, 137 NLRB 1178 (1962); *Ohio Valley Carpenters District Council (Cardinal Industries, Inc.)*, 144 NLRB 91 (1963); *Metropolitan District Council of Philadelphia (Charles B. Mahin and National Woodwork Manufacturers Association)*, 149 NLRB 646, 658–659 (1964); *Local 636, United Association (Mechanical Contractors Association of Detroit)*, 177 NLRB 189 (1969); *Local Union No. 438, United Association (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), enforced *sub nom. George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F.2d 323 (C.A. 4).

[14] The court of appeals speculated that Hudik could have attempted to settle the dispute by offering to compensate its employees for the lost work (Pet. App. 29a–31a). However, the Union never indicated that it would have been content if Hudik had paid its employees for the piping work on the Slant/Fin units. The Union's agent stated to both Austin and Hudik that the Union members simply would not install the Slant/Fin units (*id.* at 141a, 150a). It was therefore unnecessary for the Board to consider

course (like a refusal to bid on the job initially) would not have preserved or produced work for Hudik's employees; indeed, it not only would have deprived the employees of the job of connecting the Slant/Fin units but also would have deprived the employees of other piping work in the Home. The first course could have produced work for Hudik's employees only if Austin could have been induced to buy units that did not have prefabricated internal piping. Hence, as the dissenting opinion in the court of appeals observed (Pet. App. 83a), "the pressure created by the Hudik employees' boycott of the Slant/Fin units must have been directed at Austin and Slant/Fin as they were the only parties with the power to satisfy the demand that the work be taken from Slant/Fin employees and reassigned to the Union." Indeed, the fact that the Union agent went to Austin first (Pet. App. 141a, 150a–151a) confirms that the Union's principal concern was Austin's decision to purchase prefabricated units.

what effect, if any, a Union demand for compensation would have had upon its analysis. The problem is not presented by this case.

What is more, since Hudik's contract was for a fixed fee (A. 58), any payment of extra compensation would have been satisfied out of its pocket. Hudik would not likely have viewed such a demand as affording a practical alternative to the two courses suggested above. See *Local 742, Carpenters (J. L. Simmons Co.)*, 201 NLRB 70, enforcement denied *sub nom. Local 742, Carpenters* v. *National Labor Relations Board*, C.A.D.C., No. 73–1120, March 4, 1976. Too, any demand for extra compensation for work that Hudik never possessed and did not have a right to obtain, no less than a demand for such work itself, would demonstrate a union "object" beyond Hudik and reflect, at least in part, dissatisfaction with the decision of "the owner, the designer, the general contractor" (Pet. App. 115a) to use prefabricated goods. See also note 21, *infra*.

This analysis is entirely consistent with the principles enunciated in *National Woodwork.*[15] The circumstances of this case, taken together, demonstrate that, although the Union may have had a legitimate desire to preserve work for Hudik's employees, it knew that Hudik had no power to assign the disputed work to its employees. The Union necessarily intended to use Hudik as its cat's paw in order to place pressure upon those who had control over the work sought. Although primary activity lawfully may have the incidental effect of forcing a cessation of, or change in, business relations, the Board could reasonably conclude, as it did, that such a cessation or change, although "incidental" in *National Woodwork,* was "an" object of the Union here.[16]

A decision by Frouge not to buy prefabricated doors would have secured more work for its employees. But a cessation of business relations between Hudik and Austin would have produced no work on the Home for Hudik's employees; they could have obtained the work they sought only if they (with Hudik's aid) could have induced Austin to alter

[15] We submit, accordingly, that courts agreeing with the decision below are in error. See *National Labor Relations Board* v. *Local 164, Electrical Workers*, 388 F.2d 105, 109 (C.A. 3); *American Boiler Manufacturers Association* v. *National Labor Relations Board*, 404 F.2d 556, 561 (C.A. 8); *Beacon Castle Square Building Corp.* v. *National Labor Relations Board*, 406 F.2d 188, 192, n. 10 (C.A. 1) (dictum); *Western Monolithics Concrete Products, Inc.* v. *National Labor Relations Board*, 446 F.2d 522, 526 (C.A. 9).

[16] The Union's action was unlawful if *an object* of the action falls within the statutory proscription. See pages 13–14, *supra.*

Austin's specifications and its business relations with Slant/Fin. In short, in *National Woodwork* the union could accomplish its design by changing the decision of Frouge alone; in the present case the Union's efforts cannot succeed without changing Austin's decision as well as Hudik's. It was proper, therefore, for the Board to conclude that the Union's pressure on Hudik was not "related solely to preservation of the traditional tasks of the jobsite [steamfitters]," but was "tactically calculated to satisfy union objectives elsewhere." *National Woodwork, supra,* 386 U.S. at 644, 646.[17]

In *National Woodwork* the Court also emphasized that the boycott "was a shield carried solely to preserve the members' jobs," and that "Congress may have viewed the use of the boycott as a sword"—that is, "where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks"—in a different light. 386 U.S. at 630–631. The Union in this case has brought pressure upon Hudik to cause it to

[17] Two courts of appeals have agreed with this analysis. *George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F.2d 323 (C.A. 4), enforcing 201 NLRB 59; *Associated General Contractors of California, Inc.* v. *National Labor Relations Board*, 514 F.2d 433, 437–438 (C.A. 9). But cf. the Ninth Circuit's decision in *Western Monolithics, supra.*

A recent commentary also endorses the Board's approach, although not all of its analysis. Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 Harv. L. Rev. 904 (1976). Professor Leslie's "cartel" analysis of the right to control cases is consistent with the findings of the Administrative Law Judge in this case. See Pet. App. 156a–164a. See also *id.* at 22a, n. 25.

"reach out" to acquire new work for its employees. As the dissenting opinion in the court of appeals pointed out (Pet. App. 85a, emphasis in original, footnote omitted):

> The Union is seeking what it asserts is *work preservation*, but the means it has chosen toward that end—a strike against an employer who never had the disputed work to assign—constitutes secondary pressure. * * * The only parties who could be said to have taken the work away from the local union are Slant/Fin, who manufactured the units complete with internal piping, and Austin, who specified the installation of such completed units. The strike insofar as it is against Hudik is not to achieve work *preservation* because the strike could not *preserve* work that Hudik never possessed and never had the power to assign.

The situation here is therefore similar to one in which a union invokes a work "preservation" agreement in an effort to acquire, for the employees covered by the agreement, work of a type different from that which they previously have performed. Such efforts, although concededly designed to affect the "labor relations of the contracting employer *vis-a-vis* his own employees" (*National Woodwork, supra,* 386 U.S. at 645), nonetheless quite properly have been held to be secondary and hence unlawful. See, *e.g., Associated General Contractors of California, Inc.* v. *National Labor Relations Board,* 514 F. 2d 433, 438 (C.A. 9); *Building Material, Teamsters Union Local No. 216* v. *National Labor Relations Board,* 520 F. 2d 172, 178–

179 (C.A.D.C.); *Local Union No. 98, Sheet Metal Workers* v. *National Labor Relations Board,* 433 F. 2d 1189, 1194–1195 (C.A.D.C.).[18]

The situation here also has features in common with *National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra,* and with *National Labor Relations Board* v. *Local 825, Operating Engineers, supra.* The decision of the Board here is consistent with those decisions. In *Denver* the Union had a longstanding dispute with Gould & Preisner, an electrical subcontractor that employed non-union workers. Instead of confining its economic pressure to Gould & Preisner, which alone had power to employ union workers and thus to resolve the dispute, the union exerted pressure against Doose & Lintner, the general contractor. The Court rejected the union's con-

[18] The court of appeals expressed fear that the Board's "right to control" test would lead to the conclusion that there was no primary employer against which the union could exert economic pressure (Pet. App. 26a, n. 29; see also *id.* at 53a–56a (Bazelon, C. J., concurring)). But the Board found it unnecessary to decide whether "picketing or other actions brought to bear directly against Austin and Slant/Fin would constitute lawful primary activity" (Pet. App. 142a, n. 1) and this Court need not consider that problem. Compare *Bricklayers' Union, Local No. 8 (Western Monolithics Concrete Products, Inc.),* 180 NLRB 43, 46–47 (1969), set aside *sub nom. Western Monolithics Concrete Products, Inc.* v. *National Labor Relations Board,* 446 F.2d 522, 524–527 (C.A. 9), with *United Brotherhood of Carpenters, Local 112 (Summit Valley Industries, Inc.),* 217 NLRB No. 129 (1975), ALJ Dec., pp. 28–29, pending review *sub nom. Chamber of Commerce of the United States* v. *National Labor Relations Board,* C.A. 9, Nos. 75–2064, *et al.* And see *Connell Construction Co.* v. *Plumbers & Steamfitters Local No. 100,* 421 U.S. 616, 632–633.

tention that it was engaged in a primary dispute with Doose & Lintner alone because it sought simply to force the latter to make the job all-union. Sustaining the Board's finding that the pressure on Doose & Lintner was secondary and hence unlawful, the Court stated (341 U.S. at 688):

> If there had been no contract between Doose & Lintner and Gould & Preisner there might be substance in their contention that the dispute involved no boycott. * * * However, the existence of the Gould & Preisner subcontract presented a materially different situation. The non-union employees were employees of Gould & Preisner. The only way that respondents could attain their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract. The result is that the Council's strike, in order to attain its ultimate purpose, must have included among its objects that of forcing Doose & Lintner to terminate that subcontract.

Similarly, in *Operating Engineers* the union had a dispute with White, a construction subcontractor, because it employed ironworkers instead of engineers to operate a welding machine. Instead of confining its economic pressure to White, which alone had the right to employ engineers and thus to resolve the dispute, the union brought economic pressure to bear against, *inter alia,* Burns & Roe, the general contractor. The Court sustained the Board's conclusion that the pressure on Burns & Roe was secondary and hence

unlawful. The Court found that the clear implication of the union's action "was that Burns would be required either to force a change in White's policy or to terminate White's contract." 400 U.S. at 305.

In short, in both cases the union pressure was secondary because it was exerted against a firm that lacked power to grant the union's ultimate demand, and that could produce advantage for the union only by acting as the union's ally in bringing pressure upon a third party, by inducing a change in the business of that third party or by ceasing to do business with it. In those cases the union brought pressure on a general contractor, with an object of affecting the decisions of a subcontractor. Here the Union has brought pressure to bear upon a subcontractor, with an object of affecting its dealings with the general contractor and engineer. Surely this difference does not warrant a different conclusion. Nor is a different conclusion justified here because the Union may have had a dispute with Hudik over the working conditions of its employees. The fact remains that the dispute was created by Austin's decision and Hudik was powerless to resolve it; the Union's pressure on Hudik therefore must have included at least one secondary object—to change Austin's specification of Slant/Fin units.

D. THE UNION'S CONTRACT WITH HUDIK DOES NOT GIVE IT LICENSE TO ENGAGE IN UNLAWFUL SECONDARY PRESSURES

The court of appeals relied heavily upon the fact that the Union's contract with Hudik contained a

work preservation clause.[19] In the light of this clause, the court reasoned, the Union's strike simply was an attempt to compel Hudik to abide by its commitments, an object that the court thought was plainly primary.[20] See Pet. App. 6a, 8a, n. 9, 17a–25a, 29a–31a. The approach of the court of appeals in effect allows a Union and one employer to determine whether pressure is

[19] However, in *Local 742, Carpenters* v. *National Labor Relations Board*, 444 F. 2d 895 (C.A.D.C.), certiorari denied *sub nom. J. L. Simmons Co.* v. *Local 742, Carpenters*, 404 U.S. 986, on remand, 201 NLRB 70, enforcement denied *sub nom. Local 742, Carpenters* v. *National Labor Relations Board*, C.A.D.C., No. 73–1120, March 4, 1976, the court of appeals disapproved the Board's "right to control" test even in the absence of a work preservation clause. There was no contract at all between Local 742 and Simmons; the contract between Simmons and Local 742's parent (the United Brotherhood of Carpenters and Joiners) simply required Simmons to observe the working conditions and wages prevailing in the community where the work was to be performed. The court of appeals nevertheless found that the dispute was primary; it relied not on a work preservation *clause* but a work preservation *claim*, finding them to be equivalent. *Local 742, Carpenters*, read together with the instant case, indicates that in the view of the court of appeals union pressure is primary whenever it has a work preservation objective. Accordingly, Professor Leslie has stated that the court's reliance here on the contract clause between the Union and Hudik is "difficult to accept at face value." Leslie, *supra*, 89 Harv. L. Rev. at 907, n. 15.

[20] No charge was filed with the Board challenging the agreement under Section 8(e) of the Act, 29 U.S.C. 158(e), which makes it unlawful "to enter into" a secondary boycott agreement. Accordingly, the Board had no occasion to determine whether both the Union and Hudik contemplated, at the time the agreement was entered into, that it would apply to a situation where Hudik lacked control over the work. The Board assumed *arguendo* that the agreement was intended to apply even to that situation (see note 4, *supra*).

primary or secondary. But whether the Union's pressure on Hudik is primary or secondary depends on the criteria for differentiating the two types of activity, criteria that Congress has incorporated in the Act; the parties cannot by contract convert into primary activity that which the statute makes secondary. See *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 105. If, as we have argued, the Union's pressure is secondary because directed against an employer that is able to "preserve" work for the Union's members only by inducing a third party (Austin) to cease doing business with a fourth party (Slant/Fin), the pressure does not become legitimate primary activity merely because the employer may promise, in an agreement with the Union, to cooperate in bringing pressure upon those parties that have the right to control the disputed work. An agreement that makes the employer the Union's willing ally instead of its unwilling agent in bringing pressure to bear on third parties can neither amend an Act of Congress nor change the character of the Union's object.[21] Cf. *Connell Construction Co.* v. *Plumbers &*

[21] Whether a work preservation agreement was intended to have a secondary objective is ordinarily determined by the parties' understanding as of the time the agreement was executed. See *Meat and Highway Drivers, Local Union No. 710* v. *National Labor Relations Board*, 335 F.2d 709, 716 (C.A.D.C.); *Sheet Metal Workers, Local Union No. 223* v. *National Labor Relations Board*, 498 F.2d 687, 693 (C.A.D.C.). If Hudik did not contemplate when the work preservation agreement was entered into that it would apply to a situation in which Hudik lacked control over the work, the agreement could not privilege the Union's use of economic

(Continued)

Steamfitters Local No. 100, 421 U.S. 616; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797.

(Continued)

pressure to enforce it in that secondary situation. On the other hand, if the Union and Hudik contemplated that the agreement would apply even where Hudik lacked control over the work sought, the agreement to that extent would appear to be secondary and unlawful under Section 8(e), unless saved by the construction industry proviso to that Section. That proviso allows secondary agreements in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." See *Connell Construction Co,. supra*, 421 U.S. at 626–633; *United Association Pipe Fitters Local Union No. 455 (American Boiler Mfrs. Assn.)*, 154 NLRB 285, 288–289 (1965), enforced *sub nom. American Boiler Mfrs. Assn.* v. *National Labor Relations Board*, *supra*, 366 F.2d at 822–823, on remand *sub nom. United Association Pipe Fitters Local Union No. 455*, 167 NLRB 602, 603–604 (1967) (Hickey incident); *Drivers, Local Union No. 695* v. *National Labor Relations Board*, 361 F.2d 547, 552–553 (C.A.D.C.). However, an agreement protected by the proviso may be enforced only through a lawsuit or other similar means, and not through pressure that would constitute restraint and coercion within the meaning of Section 8(b)(4)(B). See H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39–40 (1959); *Orange Belt District Council* v. *National Labor Relations Board*, 328 F.2d 534, 537 (C.A.D.C.); *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, 405 F.2d 159, 162–164 (C.A. 9); *Sheet Metal Workers, Local Union No. 223 (Continental Air Filters Co.)*, 196 NLRB 55, 56 (1972), remanded on other grounds, 498 F.2d 687 (C.A.D.C.). Cf. *Southern California Pipe Trades District Council No. 16 (Associated General Contractors of California)*, 207 NLRB 698 (1973), reversed *sub nom. Associated General Contractors of California* v. *National Labor Relations Board*, *supra*, 514 F.2d at 438–439; *United Association Pipe Fitters Local Union No. 455 (American Boiler Mfrs. Assn.)*, *supra*, 154 NLRB at 291–292, on remand, 167 NLRB at 604 (Pierre Aircon incident), remanded on other ground *sub nom. American Boiler Mfrs. Assn.* v. *National Labor Relations Board*, 404 F.2d 547, 556 (C.A. 8), certiorari denied, 398 U.S. 960.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submited.

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IN THE

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OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

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No. 75-777

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

We accept the Board's Statement of the Case. We emphasize the following finding:

> "We note that refusal of the Respondent to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, the subcontractor, and

was for the purpose of preserving work they had traditionally performed." (Pet. 141(a)) [1]

The record shows without contradiction that members of this union, working for this employer, Hudik-Ross, (hereafter referred to as "Hudik,") did perform the internal piping on air-conditioning units similar to those involved in this case manufactured by other companies, A. 46-47. That is the work that these employees were attempting to preserve.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case Hudik and the union entered into a collective bargaining agreement which conditions the employees' obligation to perform specified work on the assurance that they would "cut and thread internal piping in climate control units" which Hudik contracted to install. As the Board expressly found, this was a "valid work preservation clause * * * and was for the purpose of preserving work [Hudik's employees] had traditionally performed" (Pet. 141a). Thereafter, and notwithstanding its collective bargaining agreement, Hudik bid for, and was awarded, a subcontract let by Austin, a general contractor and engineer. That subcontract contained a specification that the internal piping in the climate control units to be installed was to be cut and threaded by the manufacturer's employees and not by the subcontractor's employees. Hudik's employees refused to install those units.

[1] "Pet." refers to the Petition for Certiorari; all references to the opinions in the court below and to the Board's decision will be to their reproduction in the Petition. "Bd.Br." will refer to the Board's brief. "A." will refer to the record appendix in this Court.

In conformity with this Court's holding in *Woodwork Mfrs.* v. *NLRB,* 386 U.S. 612 (*National Woodwork*), the Board acknowledges that the strike would have been lawful but for Hudik's contract with Austin. According to the Board, by that contract Hudik gave away to Austin "the right to control" [2] the decision as to who would thread the pipe. The circumstance of this second agreement, says the Board, transmuted Hudik from an involved primary disputant to a secondary who has no concern in the primary dispute and made the strike by Hudik's employees against their employer (Hudik) to require him to abide by his commitment contained in the first agreement an illegal secondary boycott under § 8(b)(4)(B).

The Board's recognition that the collective agreement between the union and Hudik is lawful is the inescapable result of the total identity between the clause in question here and the clause challenged in *National Woodwork* where

> "Frouge Corporation, a Bridgeport, Connecticut, concern, was the general contractor on a housing project in Philadelphia [and] had a collective bargaining agreement with the Carpenters' International Union * * * [which provided that] 'No [employee] will handle . . . any doors . . . which have been fitted prior to being furnished on the job . . .'. * * * These [fitting tasks are] traditionally performed in the Philadelphia area by the carpenters employed on the jobsite. However, precut and prefitted doors ready to hang may be purchased from door manufacturers. Although Frouge's contract and job specifications did not

[2] Throughout its history, the Board's doctrine at issue here has been described as either "right of control" or "right to control"; we shall use these terms interchangeably throughout this brief.

call for premachined doors, and 'blank' or 'blind' doors could have been ordered, Frouge contracted for the purchase of premachined doors from a Pennsylvania door manufacturer which is a member of the National Woodwork Manufacturers Association, petitioner in No. 110 and respondent in No. 111. The Union ordered its carpenter members not to hang the doors when they arrived at the jobsite." (386 U.S. at 615-616.)

National Woodwork responded by filing charges alleging that the "will not handle" provision violated § 8(e), and that the strike to require adherence to the agreement violated § 8(b)(4)(B). After a meticulous review of the evolution of the law prior to 1947, and of the Taft-Hartley and Landrum-Griffin legislative materials, the Court concluded that since the "objective of the ['will not handle' provision] was preservation of work traditionally performed by the jobsite carpenters * * * the Union's making of the * * * agreement was not a violation of § 8(e)", and that since "the conduct of the Union on the Frouge jobsite related solely to preservation of the traditional tasks of the jobsite carpenters [,] * * * the Union's maintenance of the provision was not a violation of § 8(b)(4)(B)" (386 U.S. at 646).

The Court emphasized that the "inquiry" required by a § 8(b)(4)(B) or § 8(e) charge is "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the] employees [of the employer who signed the agreement and who is being struck] or whether the agreements and boycott were tactically calculated to satisfy Union objectives elsewhere" (*id.* at 644). "The touchstone," said the Court, "is whether the agreement or its maintenance

is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" (*id.* at 645).

The issue here is therefore whether under the test enunciated by the Court it is a material difference that in *National Woodwork* Frouge violated its commitment in the collective agreement by opting to buy pre-cut doors, and that in the instant case Hudik violated its commitment first by opting to enter into a second agreement specifying that it was to install units with pre-cut and threaded pipe, and then by directing the employees to install such units.

It is our position that a strike by employees against their own employer to protest his failure to maintain their agreed-upon working conditions is the paradigm example of the primary activity which Congress protected by §§ 7 and 13 and differentiated from the secondary boycott prohibited by § 8(b)(4)(B). That permitted primary activity is not, we submit, converted into forbidden secondary activity because the employer's breach is accomplished not in one step (as in *National Woodwork*), but in two—the additional step being the employer's anticipatory breach by bidding for and accepting the subcontracts wherein he surrendered his "right to control" the decision of what work his employees are to perform. In both instances the "maintenance" of the collective agreement "is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" (386 U.S. at 645), and is therefore primary activity.

Our difference with the Board therefore comes down to this. The agency believes that the test that determines an employer's status as a primary disputant against whom economic pressure may be brought is

whether the employer has retained the legal right to meet the employees' demand without effecting a change in his business relations with others. It is our view that the statutory test is whether the labor dispute concerns the struck employer's "labor relations * * * *vis-a-vis* his own employees." We submit that the fact that the employees' demands have the inevitable consequence of affecting the terms on which their employer deals with others has never been regarded as a basis for transmuting an obviously involved employer into a disinterested secondary.

In Part I we show that at all times Congress and this Court have regarded a dispute between employees and an employer relating to those employees' working conditions to be lawful primary activity which was not interdicted by the prohibition against the secondary boycott; (2) that the Act contemplates the use of economic weapons by the employees and by the employer in fixing the terms of their relationship, and does not protect either party against its own economic weakness; and (3) that a primary strike does not become a secondary boycott even if it has inevitable adverse effects on third parties who do business with the struck employer. The universal understanding of the line of demarcation is that stated by Sen. Taft:

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. *If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike.*" (93 Cong. Rec. 4323, emphasis added.)

In Part II we analyze the Board's doctrine in terms of its own rationale. We show first that after *National Woodwork* five Courts of Appeals determined that the

right of control test focuses on factors extraneous to the considerations which this Court there held (386 U.S. at 644-646) must govern in determining whether the maintenance of a work preservation agreement is primary or secondary. We next examine the reasoning by which the Board concludes that a strike to enforce a work preservation agreement *must* be directed at the party which has control, because (in the Board's view) the strike cannot be successful without a change of decision by that party. We show that the assumptions underlying that analysis completely ignore industrial reality, particularly the reality regarding the reasons unions go on strike. We point out that the employees' refusal to perform labor under conditions contrary to those agreed upon, is the most elementary form of primary concerted activity. We emphasize that a strike is rarely undertaken because short-run advantages are anticipated; rather, it is the long-run relationship between the employer and the employees which is at stake. Plainly, if the union acquiesces in the breach of its agreements, these become a mere scrap of paper. Lastly, in Part II we show that the Board's doctrine contains a fatal internal contradiction because it provides no acceptable answer to the following question: "If the union is not permitted to strike the contractor who has given up control, may it put pressure on the general contractor who does have control?" If the answer is "Yes", the focus of dispute is shifted from the bargaining unit covering the employer and his employees to some other party, thereby turning § 8(b)(4)(B) against itself. On the other hand, if the employees may not strike the party with control either, they are stripped absolutely of their right to protect their job security; this is a result

which the *National Woodwork* Court refused to attribute to Congress. The Board's vacillations and indecisions on this problem since it first adopted "right of control" only underscore the impossibility of reconciling its theory with the Congressional judgments embodied in the Act.

In Part III we discuss the only piece of legislative history cited by the Board, and the precedents in this Court on which it places reliance.

The Board cites a fragment of a sentence in the House Report on the Hartley bill, whose prohibitions were harsher than those which were ultimately adopted. Read in its entirety, the paragraph from which the Board quotes selectively establishes that even that bill was based on the understanding that the secondary strike is one that goes beyond economic pressure on the employer whose labor relations are the subject of the dispute.

The Board's reliance on the *Denver Building* case, 341 U.S. 675, is, as the court below explained at length (Pet. 36a-40a), misplaced. There is, indeed, an important parallel between this case and *Denver*. In both cases the underlying labor dispute was between the union and the subcontractor. But in *Denver* the union violated the Act by putting pressure on the general contractor who was not a party to the labor dispute, whereas in this case the union put pressure on the subcontractor, who was a party, because he was the employer. The Board asserts that in *Denver* the general was characterized as an "unoffending employer" because he lacked the right of control over the labor relations which were at issue in the dispute. But that is not what this Court said, and in fact the secondary party, the general contractor, did have control over the labor relations of the primary employer, the subcontractor, because he could terminate the subcontract. That is the precise "control" which the general contractor had in this case.

Lastly, the Board cites *Carpenters Union* v. *Labor Board,* 357 U.S. 93 (*Sand Door*), for the proposition that parties cannot by agreement convert secondary conduct into primary conduct. We agree. But here, the agreement was primary, a proposition established not only by *National Woodwork,* but by the Board's own determination (Pet. 141a). Since, as this Court held in *National Woodwork,* §§ 8(e) and 8(b)(4)(B) are coextensive in their definition of primary and secondary activity, the maintenance of that agreement by refusing to perform work under conditions which do not comply therewith, is also primary. (386 U.S. at 644-646.) Thus, the holding of *Sand Door* is inapposite. The proposition which is relevant in this case is that employers cannot by agreement "by design or otherwise" convert *primary* activity into *secondary* activity. *Steelworkers* v. *Labor Board,* 376 U.S. 492, 501 (*Carrier*).

ARGUMENT

I. THE RIGHT OF CONTROL THEORY IS INCONSISTENT WITH THE BASIC PRINCIPLES OF THE ACT.

A. The essence of our case is that a strike by employees against their own employer in defense of their own working conditions is protected primary activity, not a prohibited secondary boycott. Following the path mapped out by this Court in *National Woodwork,* 386 U.S. at 620-626, we begin our proof of that proposition by tracing the evolution of Congressional policy with respect to secondary boycotts.

The starting point is the holding in *Duplex Co.* v. *Deering,* 254 U.S. 443, that § 20 of the Clayton Act "im-

munized only trade union activities *directed against an employer by his own employees*"—a "primary boycott" (*National Woodwork*, 386 U.S. at 621) (emphasis added)—but not a secondary boycott, the "core concept" of which is "union pressure directed at a neutral employer the object of which was to induce or coerce him to cease doing business with an employer with whom the union was engaged in a labor dispute" (*id.* at 621-622).

The next step was the adoption of the Norris-LaGuardia Act which—particularly by its expansive definition of the term "labor dispute"—" 'established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation' " (*id.* at 622-623, quoting *United States* v. *Hutcheson*, 312 U.S. 219, 231). Thus,

> "Congress abolished, for the purposes of labor immunity, the distinction between primary activity between the 'immediate disputants' and secondary activity in which the employer disputants and the members of the union do not stand 'in the proximate relation of employer and employee . . . .' H.R.Rep.No. 669, 72d Cong., 1st Sess., 8 (1932)." (386 U.S. at 623)

The pendulum swung back with the enactment of what is now §8(b)(4)(B)[3] of the Taft-Hartley Act, the purpose of which was described by Senator Taft:

> "This provision makes it unlawful to resort to a *secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.* . . . [U]nder the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. *All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.*" (386 U.S. at 624, quoting 93 Cong. Rec. 4198.)

[3] This provision was § 8(b)(4)(A) under the 1947 amendments, and was redenominated § 8(b)(4)(B) in the 1959 Landrum-Griffin amendments. We shall throughout use the latter form to avoid confusion.

Thus, "[i]n effect Congress, in enacting §8(b)(4)[(B)] of the Act, returned to the regime of *Duplex Printing Press Co.*, and *Bedford Cut Stone Co.* [v. *Stone Cutters Assn.*, 274 U.S. 37] * * * " (386 U.S. at 632). From the beginning, that regime, as we have just seen, regarded strikes by employees against their own employer over their own working conditions—a primary boycott—as the polar opposite of the secondary boycott. This dichotomy was given pithy expression in Sen. Taft's explanation of §8(b)(4)(B):

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. *If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike.*" (93 Cong. Rec. 4323, emphasis added.)

B. It is not a mere happenstance that the 1947 Congress utilized the line of demarcation drawn in *Duplex* between primary activity—protected under the Act by §§ 7 and 13—and the secondary boycott—prohibited by §8(b)(4)(B). For the right of employees to strike their own employer in defense of their own working conditions—and the employer's correlative

right to employ economic pressure to gain his position—is the centerpiece of the national labor policy.

The thrust of the entire Act—especially through §§ 8(a)(5), 8(d), and 9, which require an employer to bargain collectively with the representative selected by an appropriate bargaining unit of his employees and to treat with that representative on the mandatory bargaining subjects stated in the Act—is to make the bargaining unit covering an employer and his employees the cockpit for resolution of disputes concerning employees' wages, hours, and other terms and conditions of employment. Cf. *Mine Workers* v. *Pennington,* 381 U.S. 657, 666; *Connell Co.* v. *Plumbers and Steamfitters,* 421 U.S. 616, 625-626. As this Court held in sustaining the constitutionality of the Wagner Act:

> "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." (*Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 45.)

Section 8(d), which, like § 8(b)(4)(B) was added to the Act in 1947, "made this policy an express statutory mandate" (*NLRB* v. *Burns Security Services,* 406 U.S. 272, 282-283).

In *Burns*, as on earlier occasions, it was necessary for this Court to remind the Board of "the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract" (406 U.S. at 287,

quoting *Porter Co.* v. *NLRB,* 397 U.S. 99, 108). See also *Labor Board* v. *American Ins. Co.,* 343 U.S. 395, 401-402; *Labor Board* v. *Insurance Agents,* 361 U.S. 477, 490, 498; *Teamsters Local* v. *Labor Board,* 365 U.S. 667, 676-677.[4] And, this Court has also had repeated occasion to remind the Board that the indispensable condition of freedom of contract is the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties," and that economic warfare is therefore "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized" (*Insurance Agents,* 361 U.S. 477, 489.) See also *id.* at 490, 495, 497-498. The Act creates a system of "[c]ollective bargaining with the right to strike at its core * * * " (*Bus Employees* v. *Missouri,* 374 U.S. 74, 82). Accordingly, as was recently reiterated in *Ma-*

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[4] The Board does not avowedly disagree with this principle; but then, neither did it do so in the cited cases. Rather, in each, the Board discovered in some provision of the Act the purported authority to regulate employer or union conduct in a manner which did, as this Court then held, undermine that policy. See *American Ins. Co., supra* (§ 8(a)(5)); *Insurance Agents, supra* (§ 8(b)(3)); *Teamsters Local, supra* (§ 8(a)(3), § 8(b)(2)); *Porter Co., supra* (§ 10(c)); *Burns, supra* (§ 8(a)(5)). So it is with the Board's construction of § 8(b)(4)(B) here.

To be sure, § 8(b)(4)(B), unlike § 8(b)(3), is "drafted with reference to specific forms of economic pressure," *Insurance Agents, supra,* 361 U.S. at 498. But it was drafted with a clear understanding of the basic criteria for differentiating between conduct prohibited by that section and conduct which it does not reach. Thus, although the application of those criteria is often difficult, for example, in the common situs picketing situation to which Bd. Br. 14 tries to assimilate this case, it is not open to the Board to redefine these criteria and to treat as dispositive the answer to a "question" that has not "been asked" by Congress (id. at 499): "Who has the right to control?"

chinists v. *Wisconsin Emp. Rel. Comm'n.*, — U.S. —, 44 U.S.L.W. 5026 (June 25, 1976), this Court's decisions

> "* * * hold that Congress meant that [self-help] activities, whether of employer or employees, were not to be regulable * * * by the NLRB, [which is not] 'afforded flexibility in picking and choosing which economic devices of labor and management would be branded as unlawful' * * * [and is] without authority to attempt to 'introduce some standard of properly "balanced" bargaining power,' * * * or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.' [Such] regulation * * * den[ies] one party to an economic contest a weapon that Congress meant him to have available' * * * [and therefore constitutes] entry into the collective bargaining process to an extent Congress has not countenanced." (*Id.* at 5031.)

In sum, insofar as the dispute is between an employer and his employees and concerns the employees' own working conditions the Act sanctions the use of economic force and precludes Board interference in the contest of strength. A fundamental Congressional value judgment concerning the limited role of government in regulating the economy underlies the legislative determination that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act [, but rather,] is part and parcel of the process of collective bargaining" (*Insurance Agents*, 361 U.S. at 495). The basic philosophy of the Taft-Hartley bill was explained by Sen. Taft:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. In the past few disputes finally reached the point where there was a direct threat to and defiance of the rights of the people of the United States.
>
> "We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy.
>
> "I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, 'You must work at wages fixed by the Government'? I think it is a long step from freedom and a long step from a free economy to give the Government such a right.
>
> "It is suggested that we might do so in the case of public utilities; * * *. It may be a popular

thing to do. Today people seem to think that all that is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process.

"If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."[5]

C. This Court has effectuated the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own" (*Labor Board* v. *Denver Bldg. Council (Denver)*, 341 U.S. 675, 692) by recognizing that § 8(b)(4)(B) does not

> "ban traditional primary strikes and picketing having an impact on neutral employers even though the activity [falls] within its sweeping terms. *Labor Board* v. *International Rice Milling Co.*, 341 U.S. 665; see *Local 761, Electrical Workers* v. *Labor Board*, 366 U.S. 667. Thus, however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective." (*National Woodwork*, 386 U.S. at 626-627.)

The rule is that since "[s]ome disruption of business relationships is the necessary consequence of the

[5] 93 Cong. Rec. 3835-3836, quoted as authoritative, in full, in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 395, n. 21, and, in part, in *Bus Employees* v. *Missouri, supra*, 374 U.S. at 82, n. 9.

purest form of primary activity [t]hese foreseeable disruptions are * * * clearly protected. *Steelworkers* [v. Labor Board] (Carrier), 376 U.S. [492] at 496, *Electrical Workers* [v. Labor Board] (General Electric), 366 U.S. [667] at 682" (*NLRB* v. *Operating Engineers*, 400 U.S. 297, 304). See also *id.* at 303.

Thus, the *Denver* reference to an "offending employer" is to an employer with whom the union has a dispute over the working conditions of his employees, and against whom the union can lawfully bring economic pressure; and "unoffending employers and others" refers to those persons with whom the union does not have such a dispute, and against whom the Union may not bring economic pressure to cause the "unoffending employer" to cease doing business with the "offending employer." The distinction has nothing to do with the employer's competitive situation in the industry or his ability to comply with union demands covering the working conditions of his own employees. (The other side of the coin is that a party whose own employment practices are not involved in the dispute is deemed a "neutral" or "unoffending" employer, even though he has a substantial economic stake in the dispute, or even created the situation which makes it impossible for the union's demand to be satisfied by the employer.) The building trades' objection to the *Denver* case is precisely that it is economically unrealistic to treat the general contractor as a neutral given his large economic stake in the work costs of his subcontractor, and that his bidding practices favor the low-wage sub-contractor, thereby undermining union conditions. It is no more permissible for the Board and courts to substitute their views of economic "realism" (Pet. 111a-112a,

n. 66) for those of Congress where the subcontractor has given up "control" under the compulsion of the general's bidding specifications, than to do so in the *Denver* situation, where it is the employees' ox which is gored.

The indispensible condition for preservation of the right "to bring pressure to bear on offending employers" (*Denver,* 341 U.S. at 692) is that this right does not become a wrong because of the consequent "foreseeable disruption" of business relationships (*Operating Engineers,* 400 U.S. at 304). As the Court held in *National Woodwork,* "maintenance of [a] provision * * * [whose objective is] preservation of work traditionally performed by the [striking employees]" through a strike against those employees' employer is, on its face, primary activity (386 U.S. at 646). Thus, the fact that a necessary consequence of a successful work preservation strike is a disruption of business relationships between the struck employer (here Hudik) and another employer (here Austin) does not provide a basis for a finding that § 8(b)(4)(B) has been violated. Yet, as will appear herein, in the final analysis the Board's "right of control" doctrine rests on nothing more than the assumption (itself gravely flawed) that the only options open to Hudik which would satisfy his striking employees would require a disruption of Hudik's business relations with Austin.

II. THE RIGHT OF CONTROL THEORY IS UNTENABLE EVEN ON ITS OWN TERMS.

A. The Board observes that it has consistently adhered to the "right of control" theory since it decided *Clifton Deangulo and Local Union No. 98, Sheet Metal Workers (York Co.),* 121 NLRB 676, 685-686 (Bd. Br. 20, n. 13). So, indeed, it has, with the exception, critical both in practice and in its theoretical implications, that the Board has vacillated on whether economic pressure may be put on the party that *does* have control, see Part IIC., *infra.* But such consistency is not a virtue, where, as in this instance there intervened this Court's *National Woodwork* decision which, while expressly reserving the precise question, for the first time declared the statutory principle which must govern its resolution. In this circumstance it was incumbent on the Board to reexamine the validity of the "right of control" theory in light of this Court's teachings. The Board did not do so. Five courts of appeals, however, some of which had previously approved the theory (see Bd. Br. 16, n.9), did recognize that a new look at the issue was necessary. Each of the courts determined unanimously that the Board's theory was inconsistent with the statute as interpreted in *National Woodwork.*[6]

For example, the Eighth Circuit held:

> "A study of *National Woodwork* convinces us that the decision of the Third Circuit correctly reflects the teachings of that case and that Board precedent to the contrary can no longer be followed.
>
> "*National Woodwork* made clear that the test in each case is whether, under all the surrounding circumstances, the conduct of the Union has, as its

[6] *NLRB* v. *Local 164, IBEW,* 388 F.2d 105, 107-110 (C.A.3); *American Boiler Mfrs. Assn.* v. *NLRB,* 404 F.2d 556, 561 (C.A.8); *Beacon Castle Square Bldg.* v. *NLRB,* 406 F.2d 188, 192, n. 10 (C.A.1) (dictum); *Western Monolithics Concrete Products, Inc.* v. *NLRB,* 446 F.2d 522, 526 (C.A.9); *Local 636, Plumbers & Pipefitters* v. *NLRB,* 430 F.2d 906 (C.A.D.C.), followed in *Local 742, Carpenters* v. *NLRB,* 444 F.2d 895 (C.A.D.C.), *cert. denied,* 404 U.S. 986.

objective, the preservation of work for unit employees or whether the agreements and boycotts are tactically calculated to satisfy the union's objectives elsewhere. If the latter is the case, 'the boycotting employer would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. * * * The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.' *National Woodwork,* 386 U.S. at 644-645.

"It is clear in this case that the Union's conduct was addressed to the enforcement of its collective bargaining agreement and related solely to the preservation of the traditional tasks of job site plumbers. Indeed, the Board found that the Union did not have 'objectives elsewhere.' This being the case, we hold that the conduct of the Union, though coercive, was not violative of § 8 (b)(4)(B)." (*American Boiler Mfrs. Assn., supra,* 404 F.2d at 561, footnote omitted.)

So too, the District of Columbia Circuit declared that "the Board's application of the 'right to control' test completely ignores the teaching of the Supreme Court in *National Woodwork*" and identified the factors which the Board was required to consider:

> "Thus the *National Woodwork* test focuses on whether the employees have a dispute with their own employer. Is it proper to bring pressure to bear on him because it is his dispute? Or is he a 'neutral' on whom the union is bringing pressure to attain objectives elsewhere? In our view, the 'right to control' test, as formulated by the Board, is irrelevant to this determination and tends to focus attention on the wrong factors. The union's position is that it is seeking to preserve the work of Page's employees from being eliminated by

> factory prefabrication. It is this claim of primary activity which the Board must appraise."[7]

The Board ultimately responded to *National Woodwork,* and to the five adverse appellate decisions in *Local Union No. 438, etc. and George Koch Sons, Inc.,* 201 NLRB 59 (hereafter *"Koch"*). The Board adhered to the right of control test.

In the Board's view, "the whole thrust of the *National Woodwork* decision is that the pressure as directed to Frouge was primary only because (1) its object was work preservation and (2) *Frouge was in a position, as the facts themselves demonstrated, to respond itself to the union's pressure and give the union's members the work that they had traditionally performed*" (201 NLRB at 63). That description of this Court's decision (reiterated at Bd. Br. 17) is inaccurate. The second factor (underscored in our quotation) is not even mentioned as a basis for the holding, although it had been stressed in the Board's brief (Bd. Br. No. 110, Oct. Term 1967, pp. 5-6, 10). Thus, contrary to the Board, *National Woodwork* did indeed hold that the objective was primary once it was determined, "under all the surrounding circumstances, [that] the Union's objective was preservation of work for Frouge's employees," and *therefore* was not tactically calculated to satisfy union objectives elsewhere (386 U.S. at 644, footnote omitted).

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[7] *Local 636, Plumbers & Pipefitters, supra,* 430 F.2d at 909. See also *Local 164, IBEW, supra,* 388 F.2d at 107-108, 109; *Western Monolithics, supra,* 446 F.2d at 526. In *NLRB* v. *Local No. 28, Sheet Metal Workers,* 380 F.2d 827, 830 (C.A. 2), the Court also employed an analysis inconsistent with the right to control test.

In the *Koch* opinion the Board also sought to refute the objection that the right of control test was a *per se* rule:

> "In following this approach, however, our analysis has not nor will it ever be a mechanical one, and, in addition to determining, under all the surrounding circumstances, whether the union's objective is truly work preservation, we have studied and shall continue to study not only the situation the pressured employer finds himself in but also how he came to be in that situation. And if we find that the employer is not truly an 'unoffending employer,' who merits the Act's protections, we shall find no violation in a union's pressures such as occurred here, even though a purely mechanical or surface look at the case might present an appearance of a parallel situation." (201 NLRB at 64, footnote omitted).

But this was mere cosmetics. As the court below said:

> "* * * the approach of the Board as elaborated in *Koch*, and which, as we have indicated above, is a *per se* test once the *actual locus of legal control* is isolated; the Board does not consider other circumstances to determine whether the employer without control over the work itself is nevertheless not a neutral in the labor dispute." (Pet. 10a-11a, n. 9 cont., emphasis in original. See also *id.* 8a, n. 9.)

For while the Board argues "that the presumption that the union's pressure in such circumstances is secondary can be rebutted", it has found such a dispute to be primary only in the single situation in which "the struck employer itself instigated its loss of power over the work in dispute" (Bd. Br. 16).[8]

[8] The characterization of that situation as "for example" (*id.*) is therefore misleading.

And, while the Board here seizes on the fact that the union informed the general contractor Austin "that it would not let Hudik install the climate control units involved" (Pet. 141a; see Bd. Br. 21), it has also found the strike to be secondary where the union has not communicated with the general contractor, and where it points to nothing but the employer's loss of the right of control. *Koch* itself is such a case.[9]

We have examined the *bona fides* of the Board's assertion that right of control is not a *per se* test because that disclaimer was accepted by Judge MacKinnon in a dissent below causing him to approve the Board's decision in this case although he had joined in the decisions in the *Local 636* and *Local 742* cases, p. 19, n. 6, *supra*. See Pet. 100a-101a, n. 44. However, while experience has properly caused the courts to be wary of Board *per se* tests, even a genuine case-by-case approach does not merit judicial approval when it is based on a misunderstanding of the governing legal principle.

[9] The extent to which the locality is organized, a factor heavily relied upon by the dissenting opinion below (Pet. 75a-77a, 104a-109a) and discussed by the ALJ in his decision (Pet. 107a-158a) does not appear to have been relied on by the Board (see Pet. 141a-142a, and the analysis of this point at Pet. 11a-12a, n. 9 cont.). In no case has the Board discussed the extent of union strength in the community of the strike, or given any indication that it considers it to be a relevant factor. We do not mean to suggest that the Board should consider this factor, since we regard the approach of the dissenting opinion, that the potential of success is a factor weighing against the legality of a strike or other economic weapons, to be wholly antithetical to the design of the Act. See pp. 11-18 *supra*, and particularly *Machinists Union* v. *Wisconsin Rel. Comm'n.*, — U.S. —, 44 U.S.L.W. 5026, 5030, 5031; *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 317; and *Porter Co.* v. *NLRB*, 397 U.S. at 109, quoted at p. 30, *infra*.

An example close at hand, because it too involved the Board's attempted regulation of the parties' economic weapons, is *American Ship Bldg.* v. *Labor Board,* 380 U.S. 300, where this Court held that the Board had erred in outlawing bargaining lockouts although it had "exempted certain classes of lockouts from proscription" (see *id.* at 307).

The right of control theory interprets § 8(b)(4)(B) as protecting an employer against economic pressure from his employees if, according to the Board, he is helpless in the circumstances; and the single exception which the Board countenances, see p. 22, *supra,* is based on whether "*we find* that the employer is not truly an 'unoffending employer' who merits the Act's protection" (201 NLRB at 64, emphasis added). Both of these concerns are entirely misplaced. The primary-secondary dichotomy which governs § 8(b)(4)(B) depends not on the economic vulnerability or moral culpability of the employer, but on whether the dispute arises out of the employer-employee relationship. It is Congress which has established the criteria for determining whether an employer is "truly unoffending," that is whether the dispute does not involve his employees. See pp. 16-17 *supra.*

In this case, as in *American Ship,* it must be said that "the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon" (*id.* at 318).

B. The foregoing discussion demonstrates the accuracy of the Court of Appeals' statement that "the whole affirmative case that the Board makes for the

right to control doctrine is found in a single simplistic paragraph of its *Koch* opinion," which it then quoted (Pet. 27a-28a, n. 33, quoting 201 NLRB at 62, that court's emphasis):

> By the contract under which [the subcontractor] Phillips was to perform its work at the G.E. site or not perform any work at all, *Phillips was contractually required to utilize in its work certain prefabricated pipe* which had not been worked on by the employees the [union] Respondents represented. Thus, *although the Respondent's claim of work preservation was indeed valid,* Phillips by its contract with [the general contractor] *Koch had no power to give the Respondents the work they sought,* since such work was never Phillips' to award in the first place. And as Phillips had no past, present, or future authority to award this work to the *Respondents,* their *actions here must have been undertaken in order to produce their effects elsewhere. Therefore,* since the pressure directed at Phillips was undertaken for its effect elsewhere, *such activity was secondary* even though Phillips was the immediate employer here. As the Supreme Court itself said in *National Woodwork,* "In effect Congress in enacting § 8(b)(4)(A) of the Act (hence this holds for the present Section 8(b)(4)(B)) . . . barred as a secondary boycott union activity *directed against a neutral employer,* including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere."

The heart of the theory, on which the conclusion ("therefore") that the union's activity was secondary depends, is the assertion that the union's actions "*must have been undertaken in order to produce their effects elsewhere*", that is, on the general contractor who as the result of the agreement with the striking employ-

ees' employer possesses the "right to control". This central proposition is not further justified in the *Koch* opinion, but an explanation is given at Bd. Br. 20-21:

> "Confronted by the demands of its employees, Hudik had available only two courses of action: it could have induced Austin to change its requirements and specifications for the job or, failing that, it could have terminated its contract with Austin. The second course (like a refusal to bid on the job initially) would not have preserved or produced work for Hudik's employees; indeed, it not only would have deprived the employees of the job of connecting the Slant/Fin units but also would have deprived the employees of other piping work in the Home. The first course could have produced work for Hudik's employees only if Austin could have been induced to buy units that did not have prefabricated internal piping." (Footnote omitted.)

Thus, the Board's justification for its conclusion is the assumption that the Act's secondary boycott provisions are designed to interdict employee demands concerning their own working conditions that the employer is able to meet only by effecting a change in his business relations with others. The Board's implication is that a situation such as this, where a collective agreement places the employer in the position that he can deal with a third party only on terms other than those offered, is an aberration intended to be extirpated through § 8(b)(4)(B). That assumption and that implication are incompatible with the system of collective bargaining established by the Act and the specific purpose of that provision.

1. As we have seen, the Act's permission to engage in collective bargaining and to use the primary

strike, and its prohibition of the secondary boycott, do center the resolution of labor disputes in the bargaining unit covering the employer and his employees. But the Act does not presuppose that the employer and employees confront each other within a hermetically sealed container in which all pressures must be completely spent.

A collective agreement has the inevitable consequence of restricting the employer's freedom to deal with others. The employer's promise to pay his employees a certain amount per hour means that the employer cannot for long accept contracts to do work at a price less than his labor costs, or contracts tendered by financially unstable companies that do not pay their bills promptly enough to permit him to pay his employees. The employer's promise not to expose his employees to certain hazards means that the employer cannot purchase machinery that does not contain the required safeguards—in other words, that he cannot deal with suppliers whose products are cheap but dangerous. The employer's promise that his employees will not be required to work nights or weekends means that he cannot deal with those who demand service at those times. The examples could be multiplied endlessly.[10]

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[10] Bd. Br. 23, p. 17 cites as "endors[ing] the Board's approach, although not all of its analysis" an article, Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 Harv. L. Rev. 904 (1976). That analysis is deemed to be "consistent with the findings of the Administrative Law Judge in this case". These are the findings, relied on by the dissenting opinion, but not the Board, relating to the extent of organization in New York discussed at p. 23, n. 9, *supra*.

Professor Leslie asserts that the key to an understanding of the problem presented here is "the fact that the union has an interest

Sections 7, 8(a)(5), 8(d) and 13 of the Act embody the Congressional judgment that it is not the role of government to protect employers who are unable in

in restricting competition among employers." and that in light of that interest "the most efficient way of preserving bargaining unit work is the cartelization of" employers with whom the union deals by "secur[ing] a work preservation agreement." He says further that "To succeed, the union must ensure the participation of all plumbing subcontractors in the geographic area. Were a subcontractor free to bid on contracts that did not preserve the demanded work for the bargaining unit, he would attain a competitive advantage over other plumbing subcontractors and thus would fatally strain the cartel." 89 Harv. L. Rev. at 908-909. Except for injecting the conclusory pejorative "cartel", this statement that it is imperative for a union to organize all the employers in an industry if it is to be "successful" in maintaining labor standards, does not provide a novel insight. Mr. Chief Justice Taft wrote in *American Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 209:

> "Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of the neighborhood."

This was followed by Mr. Justice Stone in *Apex Hosiery* v. *Leader*, 310 U.S. 469, 503-504:

> "Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor

the give and take of bargaining to convince their employees that a particular demand will cost both the employer and the employees more in lost work or added

> standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

Thus, even under the antitrust laws, whose concepts the article borrows (although without citing either *American Steel Foundries* or *Apex*), it does not constitute a violation for a union to attempt to organize all the employers, and to exert economic pressure to compel them to adhere to the labor standards which the union seeks to establish despite the inevitable effect on other levels in an integrated economy.

The result under the secondary boycott law is no different. Indeed, the article proceeds from an entirely different view of § 8(b)(4)(B) and the national labor policy generally than that which Congress has established:

> "The subcontractor and the union do not have adverse interests on this issue; collective bargaining in the right to control situation does not involve the give and take between parties representing all relevant interests that national labor policy assumes. If this is true, it is difficult to see how labor policy is furthered by allowing the union to strike the subcontractor." (89 Harv. L. Rev. at 911).

In light of the difficulties of organizing and keeping organized all competing employers, and the limits of the elasticity of demand of buyers of construction (*see, e.g. New York Times*, City Edition, July 31, 1976, p. 1), it is open to grave doubt whether this accurately describes the subcontractor's interest, or whether the subcontractor necessarily shares Professor Leslie's view that he and the union are not adversaries in this context. If it were at all relevant, more would have to be shown of the real, rather than hypothesized characteristics of the construction industry.

But, of course, such a study is not relevant, because under the national labor policy established by Congress, collective bargain-

costs than it is worth, or who, in those instances in which reason (as the employer sees it) fails, are unable to prevail in a test of economic strength. And, of course, the converse is equally true. The Act does not protect employees who cannot convince their employer of the justice of their demands even though those demands are eminently reasonable, and who do not have the economic strength to achieve acceptance of those demands through a successful strike against that employer. For, as Mr. Justice Black wrote for the Court in *Porter Co.* v. *NLRB,* 397 U.S. at 109:

> " * * * the Act as presently drawn does not contemplate that unions [or employers] will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."

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ing does not involve everyone who has an economic interest in the outcome, but rather an employer and his employees, or at most a multi-employer group and their employees. The right to strike is similarly focused. The law of secondary boycotts does not prohibit a strike against the employer where success will have an adverse impact on the employer's customers, or those who have an economic relationship with the employer. Rather, § 8(b)(4)(B) protects those secondary parties only by forbidding the striking employees from exerting direct pressure against them in order to obtain leverage in their primary dispute with the employer. That provision is a rejection of the proposition that the labor law should take account of the inter-relatedness of independent parties at various levels of production, as this Court squarely held in the *Denver* case. Congress determined to follow the logic of narrowing the allowable area of economic conflict rather than the logic of the proposition that all components of the economy are interrelated, which is the premise of Professor Leslie's thesis.

See also *Machinists Union, supra,* 44 U.S.L.W. at 5030 and 5031.[11]

Thus, the fact that compliance with a collective bargaining demand concerning the employees' own wages, hours and terms and conditions of employment has the inevitable consequence that the employer cannot continue some of his business relationships with another does not transmute the primary labor dispute into a secondary boycott. For, if that consequence were sufficient to demonstrate a § 8(b)(4)(B) violation, that provision would give back to employers the protection denied in §§ 8(a)(5) and 8(d), and take away that granted employees in §§ 7 and 13.

In the instant case the employees made the judgment that their interests were best served by conditioning their agreement to install climate control units for Hudik on the requirement that they were to "cut and thread internal piping." They believed that overall they would gain more by working only if they could perform all the tasks they had traditionally performed than they would lose by foregoing the opportunity to install units containing pre-cut and threaded piping.

Whether their judgment was sound or not is of no relevance here. "The wisdom or unwisdom of the men,

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[11] The dissenting opinion below gave great weight to the proposition that: "Hudik could not decline to bid on projects with prefabrication specifications and continue to be a competitive subcontractor." (Pet. 103a). But as we have seen, the Act does not protect Hudik against this consequence of his employees' demands concerning their own working conditions and for the preservation of their own job security. Hudik also could not continue to be a competitive subcontractor if the wages he had agreed upon were higher than those paid by his competitors, but this does not deprive the employees of their right to insist on receiving the agreed-upon wage.

their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute" (*Labor Board* v. *Mackay Radio,* 304 U.S. 333, 344). See also *Labor Board* v. *Washington Aluminum Co.,* 370 U.S. 9, 16. Under the system of the free collective bargaining embodied in the Act they were entitled to mark out their own position as to the working conditions they would require as the *quid pro quo* for their labor. Hudik, in turn, was free to make his own judgment of where his best interest lay. He could have responded by proposing an alternative package of benefits. He could have bargained to deny the union any job protection or for a no-strike clause which would limit the remedies available to them in the event of future work preservation disputes, see Pet. 29a-30a, n.34. And, he could have locked out his employees to force them to concede, or if they struck for an agreement, he could have replaced them.

The situation is no different when, as here, the employees have concluded an agreement, saved themselves the right to strike in response to a breach of the work preservation provision, and determined to counter their employer's failure to abide by the contract by exercising that right to strike. The *employees,* not the Board, must decide whether, on balance, they gain or lose by acceding to their employer's conclusion that installing units containing pre-cut and threaded pipe will over the long term, produce more work, not less. And, if they decide they lose by acquiescing, then their employer must decide whether to attempt to reopen the agreement, or whether to attempt to continue to do

business with strike replacements. See particularly *Machinists Union, supra,* 44 U.S.L.W. at 5031, text and note at n. 10.

Whether the case concerns the initial work preservation demand, or the demand that a work preservation promise once made is to be respected, we submit that the one avenue of recourse closed to the employer is to refuse his employees what they seek and to utilize the Board to force those employees to work on his terms. Yet, that safe haven is precisely what the Board has granted him here.

That distortion of the Act cannot be justified on the theory that Hudik "had no power to give the [employees] the work they sought." So long as there is competition in the business market, a collective agreement is always a calculated gamble for the employer.[12] If there are employees willing to work for other employers for less the gamble may be a losing one. There is never a guarantee that the employer and his employees will prosper if the bargain is improvident. But the collective bargaining process—not § 8(b)(4)(B)—is the system of redress the Act provides.

The fact that so long as the employees stand firm their employer has open only "courses of action" (Bd. Br. 20-21) that require him to forego certain contracts

[12] It is a gamble for the employees, too. Particularly in an inflationary period they might be able to receive more for their labor if they were not bound by an agreement.

In this respect labor agreements differ not one iota from ordinary commercial transactions. The law of contracts does not permit one party to escape its obligations on the excuse that the bargain turns out to be disadvantageous. And the doctrine of impossibility provides no succor for a party who has brought upon himself mutually inconsistent obligations.

or to secure modifications of those contracts does not mean that from the employees' point of view the matter is not solely that of their own working conditions. The limits on the employer's freedom are the inevitable consequences of his employees' convictions that they wish to work for him only on certain specified terms. The employer's dilemma is not the product of pressure designed to enlist an unconcerned party in a dispute not his own, but of his inability at the bargaining table to persuade the employees to agree to work without protection which they deem necessary for their job security.

2. The Board proceeds as if it were self-evident that the strike had to be to secure some concession concerning the installation of the climate control units. But neither the record evidence nor common sense support that hypothesis.

What happened here is that the employees refused to provide their labor on terms other than those to which their employer had agreed. A more elemental exercise of the statutory right to engage in concerted activities is not readily imagined. And, it should go without saying, that activity is unmistakably primary. Too, by refusing to work under terms which are in breach of the agreement, the employees served notice on the employer that he cannot breach his collective bargaining agreement with impunity. As Professor Paul Samuelson has noted, a strike for an agreement normally takes place because "the workers believe that the employer would not have been forced [up to his last offer] except for the threat of a strike, which hangs over the negotiation like a time bomb. * * * Threats become hollow unless carried out. Both parties must show that they are prepared to in-

cur at some point the costs of a strike." [13] By the same token, a union that does not enforce its collective bargaining agreements reduces them to a shred of paper. Thus the dynamic of the collective bargaining system requires that at times a strike be called even though no immediate satisfaction is expected or desired:

> "To protect itself from imposition by its bargaining opponent, each party must impress the other with the fact that it can and will defend its interests and that unbridled aggressiveness will provoke costly stoppages. In other words, strikes serve to establish mutual respect; they also establish mutually acceptable standards of equity that can be used for settling future disputes. * * * It may be conceded that, with rare exceptions, the pecuniary stake in a *single* strike is rarely worth the economic losses incurred by either party." [14]

Thus, if one measures the cost and benefit only in terms of the final settlement as compared to the offer that was "on the table" when the strike began, the gain is often less than the loss. "In the steel strike of 1959 [for example] the company got no better terms than it could have gotten without undergoing the strike, and the same was true for the union in the General Electric strike of 1960." [15]

Accordingly, it is wholly impermissible for the Board to infer that the union must have been motivated by a desire to coerce Hudik to do *anything* in the short run,

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[13] Paul Samuelson, *Economics*, (New York: McGraw-Hill, Inc., 1976), p. 590.

[14] Melvin Reder, *Labor in a Growing Economy*, (New York: Wiley & Sons, Inc., 1957), p. 171.

[15] Alfred Kuhn, *Labor: Institutions and Economics*, (Harcourt, Brace & World, Inc., 1967), p. 138.

rather than "to establish mutual respect," *etc.* The likelihood, even the certainty, that this would result in a short-run loss of work adds nothing to the Board's argument. For, as we have demonstrated, a union which engages in a strike (like an employer who takes a strike) does so in the expectation that even if it is successful, the short-run losses will outweigh the gains; what is at stake is the union's long-run relationship with the employer. And, under the circumstances confronting the union, a strike to maintain its standards and the sanctity of its agreement was not only a rational response but one which it could hardly avoid for long.

A related deficiency in the Board's theory is that it assumes that work preservation cannot have been the union's objective except by coercing Hudik to compel Austin to change its agreements because otherwise the strike would have resulted in less rather than more work (Bd. Br. 21). This is the equivalent of saying that a union cannot be striking for a wage increase when it is clear (as it often is) that the employees cannot, even if they ultimately win the strike, recoup the earnings that they lost by striking instead of working. Both arguments assume that a decision to strike is not made unless there is a certainty, or at least a reasonable likelihood, that the improvement in the collective agreement would equate the losses by the strike. Again industrial experience is to the contrary. "The very essence of a strike is that its outcome is uncertain, or else it would never have been undertaken. If union and management could predict the result it would of course pay them to settle on those terms and avoid all the costs attending a strike. But a strike is a gamble which may or may not pay off, and union members and

managements are necessarily gamblers when they decide to call or take a strike."[16] Thus, the claim that the strike constituted a "demand that the work be taken from Slant/Fin employees and reassigned to the Union" (Bd. Br. 21, quoting Pet. 83a, dissenting opinion) is wholly unjustified, and the assertion that the "Union *necessarily* intended to use Hudik as its cat's paw in order to place pressure upon those who had control over the work sought" (Bd. Br. 22, emphasis added), while rhetorically effective, is simply untrue.

3. As a variation on the theme that the union was not seeking to preserve traditional work, it is contended at Bd. Br. 23-24 that "[t]he union in this case has brought pressure upon Hudik to cause it to 'reach out' to acquire new work for its employees." This argument has not been part of the rationale of the right of control doctrine in any of the Board's decisions, and for good reason—it wholly distorts the "preserve-acquire" distinction which this Court accepted arguendo in *National Woodwork*. As the majority said in response to the same point below:

> " * * * by the very nature of subcontract bidding, a subcontractor will always be acquiring work when he bids on a project; the characterization of union activity as having a work preservation objective must therefore depend on whether it is the *type* of unit work which the employees have traditionally performed, not whether they actually performed the particular work in question. And * * * enforcement of a work preservation clause is designed to protect such traditional work whether the subcontract specifications themselves required that the traditional work be replaced by

[16] Neil W. Chamberlain and Donald E. Cullen, *The Labor Sector* (New York: McGraw-Hill, Inc., 1971), p. 579.

> prefabrication or whether the specifications granted to the subcontractor discretion to displace the employees' traditional work. In both situations the union seeks to prevent elimination of employees' work through factory prefabrication or, at a minimum, to prevent their employer from lending active support to eliminate of that work." (Pet. 24a, n. 25 cont.)

We add two comments. First, the foregoing description of the realities of subcontract bidding accords with Congress' perception. In the Senate Report which described a provision by which what is now § 8(f) came into the Act, it was said:

> "In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated." (S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., p. 28; see also *id.* at 27.)

Second, the Board's argument is of course wholly divorced from the theory underlying the "preserve-acquired" distinction as explicated in *National Woodwork:*

> "It is arguable that Congress may have viewed the use of the boycott as a sword as different from labor's traditional concerns with wages, hours, and working conditions. But the boycott in the present cases was not used as a sword; it was a shield carried solely to preserve the members' jobs. We therefore have no occasion today to decide the questions which might arise where the workers

> carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product." (386 U.S. at 630-631.)

The reality to workers of the threat of a boycotted product to their livelihood does not turn upon whether their employer makes the decision to use the product which takes over functions they have performed of his own volition or because of outside pressure; nor can the right of the employees to use economic action to defend themselves against that threat turn on that difference. To hold otherwise would strip them of their *National Woodwork* shield, due to circumstances truly beyond their "control".[17]

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[17] Here, as in *National Woodwork,* several of the *amici* argue that the right of control test should be approved because it would promote industrial efficiency. And here the same answer is called for: "Those arguments are addressed to the wrong branch of government" (386 U.S. at 644). It should not be necessary to say any more on this subject, but it does not seem inappropriate to add that this argument is not only irrelevant but unsubstantiated. In the *Local 636* case, the Court of Appeals said: "There is no indication in this case that work done at the job site varied to any material extent, in either cost or quality, from that produced as prefabricated material at a factory." (430 F.2d at 909, n. 2.) In this case, neither the general counsel nor the charging party adduced any evidence on this point. The record does show that Hudik itself has installed similar air conditioning units (by other manufacturers including American Standard & Radiator Co.) for which the piping was "prefabricated on the job" by this union (A. 46-47). Thus, while we may grant that in some circumstances work preservation agreements prevent the use of economically more efficient methods (at least if one discounts such hidden social costs as loss of craft skills and increased centralization of production facilities), there is no warrant for the *amici's* implicit assumption that a gain in efficiency if work preservation agreements are breached is a universal verity subject to judicial notice.

4. As the Court of Appeals stressed, the Board's statement of the choices open to the subcontractor is incomplete "even if one focuses narrowly on the point in time when [the subcontractor] had already executed its second contract," for he could negotiate an alternative such as an agreement by the union to install the units in exchange for extra pay, perhaps in the amount that the employees would have earned if they had performed the work (Pet. 29a-31a).[18] The Board argues that because the union here did not suggest this alternative the "problem is not presented by this case" (Bd. Br. 21, n. 14, cont.). But this evasion will not serve, because the "problem" is inherent in the Board's theory, the essential premise of which is that "[c]onfronted by the demands of his employees" the sub-

[18] The Court of Appeals also properly criticizes the Board for "ignor[ing] the realities of this labor conflict and the process by which Hudik-Ross was confronted with conflicting contractual commitments." For, the "Hudik-Ross management did not innocently awake one day to find itself in the midst of this dispute. The management had negotiated, presumably in good faith, a collective bargaining agreement which obligated Hudik-Ross to preserve for its employees the work of cutting and threading internal piping on the climate control units which these employees were to install. When the management subsequently executed a contract with Austin which it was fully aware would require its employees to install units on which these employees had not done the internal piping, it could hardly have expected the employees to acquiesce in the blatant violation of their contractual rights. As we emphasized in *Local 742, supra*, 'The legal effect of the Board's test is to allow an employer to bind his own hands and thereby immunize himself from union pressure occasioned by his employees' loss of work. In one act, the employer helps to create a labor conflict and simultaneously wash his hands of it.' Hudik-Ross could have totally avoided the labor dispute merely by honoring its bargaining agreement and not bidding on a contract which required it to breach the valid work preservation provision it had negotiated with the union." (Pet. 19a-20a, footnotes omitted.)

contractor "ha[s] available only two courses of action" (Bd. Br. 20). The very existence of a third alternative destroys that premise, and therefore the conclusion, as the court below appreciated (Pet. 6a, 22a, n. 25, 28a, n. 33 cont., 29a-31a, 38a, 42a-43a). It is of no analytic significance whether the subcontractor's alternative is to offer the union a compromise,[19] or to accede to an offer by the union.

Nor does it save the logic of the Board's position that because "any payment of extra compensation would have been satisfied out of its pocket[,] Hudik would not likely have viewed such a demand as affording a practical alternative to the two courses suggested [at Bd. Br. 20-21]" (Bd. Br. 21, n. 14 cont.). We can well imagine that Hudik (or any other subcontractor in his position) would regard it to be far more "practical", in the sense of "desirable", to require his employees to work under conditions less favorable than provided by the collective agreement and without any compensation for the breach. But this is far from saying that the subcontractor is "powerless" (Bd. Br. 15, 27) to do anything but terminate the subcontract or press the general to change its terms. And, it wholly escapes us how an employer can be deemed a "neutral" in a dispute which he is able to resolve by giving compensation to his employees, or how it can fairly be said that pressure which can achieve such payment by the employer "*must have*

[19] The Court of Appeals was surely right when it said that Hudik, "the culpable party in generating the controversy, had an obligation to reconcile its actions with its contractual commitments" (Pet. 29a, n. 34). It does not bespeak an objective beyond the employer that the union faced with one breach of the agreement declines to take the initiative in remaking the terms on which that breach will be excused.

been directed" at other parties, as the Board argues (Bd. Br. 21, quoting the dissent below, and *id.* 15, 27). Plainly, the union's efforts can "succeed" without changing any decision of the general contractor contrary to Bd. Br. 23, attempting to distinguish *National Woodwork*.

Thus, the Board's impracticality argument does not meet the objection that the right of control theory posits a dilemma which does not exist. Rather, the argument is self-defeating because it demonstrates that the dispute between the union and Hudik reduces to the basic economic struggle "between employer and employees as to the share or division between them of the joint product of labor and capital" (*American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209). That is what the primary strike is all about.

And so, the Board is driven to the position that a demand for extra compensation to perform the work would also be illegal. (Bd. Br. 21, n. 14) That indeed, is the result which it reached, although without articulating its reasoning, or attempting to reconcile that conclusion with the right of control analysis, in *Local 742, Carpenters (J.L. Simmons Co.)*, 201 NLRB 70, *enforcement denied sub nom. Local 742, Carpenters* v. *NLRB*, 533 F.2d 683 (C.A.D.C.), petition for certiorari pending, No. 75-1706.[20]

This position is utterly unfaithful to the basic analysis on which the right of control theory depends, *viz.*,

[20] In that petition the Board (p. 7, n. 5) says: "It should make no difference that the Union offered Simmons an alternative that had not been offered to Hudik in *Enterprise—i.e.*, negotiating the payment of a wage premium to compensate its employees for the loss of the finishing work", and reiterates the sentence at Bd. Br. 21, n. 14, which we quote in the next paragraph of the text.

that the object of the union's pressure must be secondary because it cannot succeed without a change of decision by a party other than the struck subcontractor (here Hudik) (Bd. Br. 15-21, 23, 27). For, of course, paying extra compensation to his employees is something which the subcontractor can do by himself.

The inadequacies and internal contradictions of the right of control theory are further exposed by examination of the details of the Board's defense of this position, which consists of a single sentence:

> "Too, any demand for extra compensation for work that Hudik never possessed and did not have a right to obtain, no less than a demand for such work itself, would demonstrate a union 'object' beyond Hudik and reflect, at least in part, dissatisfaction with the decision of the 'owner, the designer, the general contractor' (Pet. App. 115a) to use prefabricated goods." (Bd. Br. 21, n. 14)

Let us count the ways in which this is wrong:

(i) At the outset, the argument misstates the nature of a demand for extra compensation in this situation. The compensation is not "for work that Hudik never possessed and did not have the right to obtain" (*id.*), but rather it is compensation for work that Hudik *does* possess—installing the climate control units. See *e.g.*, Pet. 29a.[21]

(ii) In the context of this case the argument is obviously circular. It takes as given the proposition that "a demand for such work * * * would demonstrate

[21] This, of course, disposes of the suggestion that § 8(b)(6) is somehow involved. (Chamber of Commerce Br. 13, n. 9). *American Newspaper Publishers Assn.* v. *Labor Board*, 345 U.S. 100, 111; *Labor Board* v. *Gamble Enterprises*, 345 U.S. 117, 123.

a union 'object' beyond Hudik", although that is the ultimate proposition which is sought to be established by the Board's entire brief.

(iii) The assertion that a demand for extra compensation would "reflect, at least in part, dissatisfaction with the decision of [a third party]" is legally irrelevant. For, while we unhesitatingly agree that effectuation of the Congressional intent does not permit the phrase "cease doing business" to be read narrowly and literally (see *Operating Engineers,* 400 U.S. at 304-305), we think that the phrase means, at a minimum, that some kind of actual impact upon the third party is contemplated by the striking union. A strike which reflects "dissatisfaction with the decision of" third parties not by putting pressure on those parties, but by insisting on compensation from the employee's employer, may under no stretch be regarded as a secondary *boycott;* Congress did not protect neutrals against a union's state of mind.

(iv) The proposition that the demand for extra compensation would "reflect, at least in part dissatisfaction of [the third parties decision] to use prefabricated goods" is also unsubstantiated and implausible. The assertion betrays one the major infirmities of the Board' method—readiness to attribute a secondary objective to employee pressure on their employer which supports an elementary demand relating to the employees' own working conditions.[22]

[22] By its silence the Board escaped the onerous task of explaining its adherence to the critical assumption that the subcontractor who has given up "control" has only *two choices* in the teeth of record evidence that he had at least *three.* The agency's unwillingness to deal with facts with which it was confronted (*Local 742* was argued orally and decided together with *Koch, supra,*

C. We are now in a position to assess the effects of the Board's right of control doctrine, as exemplified by its decision in this case. First and foremost, that doctrine, contrary to the basic premise of both § 8(b)(4)(B)'s prohibition and §§ 7, 8(a)(5), 8(d), and 13's protections, interdicts the use of economic pressure by employees against their own employer in a dispute concerning their own working conditions. Second, in the

see *id.*, 201 NLRB at 39), reinforces the impression that that opinion is a mere "rationalization" (Pet. 5a) of an institutional dogma, and wholly undermines the generous assessment of the dissent below that the Board acted in light of "expert knowledge of the competing forces within the construction industry" (Pet. 111a-112a)—a factor not mentioned in any Board opinion on this subject.

In two other cases, the union instead of striking imposed on the subcontractor who had breached the work preservation agreement, a penalty as prescribed in the agreement itself. In both cases the Board did not consider whether the contractor's ability to install the units subject to such a penalty was an alternative choice, showing that the union's objective was *not* to effect a business relationship, between the subcontractor and general contractor; rather it determined that the imposition of a penalty was not "restraint or coercion" within the meaning of Section 8(b)(4)(ii), and was lawful for that reason. *United Association, etc.,* 167 NLRB 602, 604; *Southern California Pipe Trades,* 207 NLRB 698, 700.

In the first case, the Eighth Circuit affirmed the Board on the ground that the right of control theory was devoid of merit. *American Boiler Manufacturers Association* v. *N.L.R.B.,* 404 F.2d 547, 555, a companion to the *American Boiler* case quoted at pp. 19-20, *supra.*

In the second case, the Ninth Circuit reversed the Board's interpretation of Section 8(b)(4)(ii). *Associated General Contractors of California, Inc.* v. *N.L.R.B.,* 514 F.2d 433, 438-439. The merits of the right of control doctrine, and specifically the proposition discussed in the text, were not litigated, because both the petitioner employer association and the respondent Board accepted that doctrine. The intervenor union did not litigate this issue either, instead arguing for a remand if the Section 8(b)(4)(ii) issue was decided adversely to it and the Board.

circumstances of this case, the Board's doctrine deprives the employees of their right to strike to enforce the employer's promise,[23] and, as the Court of Appeals put it, "render[s] nugatory the commitment which Hudik-Ross made and demean[s] the collective bargaining process which is the cornerstone of labor relations in the United States." (Pet. 24a-25a, footnote omitted). See also *id.* at 34a-35a.

Third, the theory of the right of control test—that the striking employees' employer is not a primary if he does not have the right to grant the employees' demands—leads inexorably to the question: If the employer has entered into an agreement with a third party, whereby the employer abandons control (and thus, under the Board's theory immunizes himself from pressure by the union to enforce its work preservation interests), may the union put direct economic pressure on the party that does have control, or is it forbidden from putting economic pressure on anyone?

In deciding this case, the Board expressly refused to choose which of these alternatives flows from its right of control theory (Pet. 142a, n.1), and its counsel say on brief that "this Court need not consider that problem" (Bd. Br. 25, n.18). While it is ordinarily the better course of adjudication not to decide questions of law until they are presented by the facts of a particular case (even though it may ultimately be decided that the first case *compelled* a particular resolution of the reserved issue), it not infrequently occurs that an understanding of its practical and doctrinal consequences on other classes of cases which will in-

[23] Indeed, as the court below points out, it deprives them of the protection of the agreement entirely, Pet. 35a-36a, n. 38. See p. 63, *infra*.

evitably arise is conducive to an informed decision of the first case.

This is the situation here. For, as we shall demonstrate, neither of the answers to the question—whether employees who are forbidden to strike their own employer on the ground that he does not have control may put direct economic pressure on the party which *does* have control—can be reconciled with Congressional judgments embodied in the Act, and set out in Part I of our brief. Thus, the question should be confronted not in order to answer it, but to gain the insight that either answer undermines the Congressional intent and that the theory which compels a choice between such legally unacceptable alternatives must itself be fatally defective.

For over ten years after *De Angulo, supra,* 121 NLRB 676 (1958), the case in which the Board first held that his employees cannot put pressure on an employer who has surrendered his right of control, the Board did not decide whether the employees may put pressure on the party that does have control.[24] The Board's first resolution of this issue was *Bricklayers Union, Local No. 8,* 180 NLRB 43, 45-47 (1969), *reversed sub nom. Western Monolithics Concrete Products, Inc.* v. *National Labor Relations Board,* 446 F.2d 522 (C.A. 9) (hereinafter *Western Monolithics*).

In that case the collective bargaining agreements between the union and West Valley and Nesbit masonry subcontractors "contained a work preservation agreement which stated that construction of fireplaces was

[24] The issue was expressly reserved in *Local 1066, Longshoremen (Wiggin Terminals, Inc.),* 137 NLRB 45 (1962).

unit work, traditionally performed at the job site" and permitted the union to refuse to install prefabricated fireplaces, unless constructed by bargaining unit employees (*id.* at 523-524). Besco, a general contractor, subcontracted the installation of fireplaces to West Valley and Nesbit, and specified that the subcontractors were to install fireplaces prefabricated by non-bargaining unit employees. The union engaged in economic pressure not only against the subcontractors West Valley and Nesbit (the counterparts of Hudik in this case) but also, by picketing the project site, against the general contractor Besco (the counterpart of Austin here). The Board, applying its right of control test, found a § 8(b)(4)(B) violation in the pressure against the subcontractor, but because the general had the right of control, determined that pressure against it was lawful. See *id.* at 525. Judge Eugene A. Wright, writing for the Ninth Circuit, disagreed:

> "The anomalous result of applying the Board's test to this case is that the union cannot picket West Valley or Nesbit under which case the common situs picketing would be governed by the standards of Moore Dry Dock Co., 92 N.L.R.B. 547. Instead, the Board ruled that the union may picket the general contractor Besco and shut down the entire project to enforce its demand regarding a limited aspect of the job.
>
> We are thus compelled to conclude, as have the commentators and at least four of our sister circuits, that the Board's singular reliance upon right to control is improper and should be abandoned." (*Id.* at 525-526, footnotes omitted.)

Then, after explaining that the right of control test is irreconcilable with *National Woodwork,* he quoted

with approval Judge Skelly Wright's analysis in *Local Union No. 636* v. *NLRB,* 430 F.2d 906:

> " 'No claim has ever been made that Local 636 has any interest at all in the labor relations of Holy Cross Hospital, the usual type of 'secondary' object. If the union had any objective with regard to the hospital, it was to convince the hospital not to use pre-piped units. But focusing on this aspect of the case makes for faulty analysis: the whole point of the work-preservation agreement in this case, as in *National Woodwork*, was to convince builders generally not to use prefabricated materials. Work preservation clauses, of necessity, will have effect by a domino-like process: the union negotiates the restriction with its employer—the contractor. The contractor, bound by his collective bargaining agreement, will not contract with a builder who seeks to use prefabricated materials. The builder may then accede to the demand that the work be done at the job site, or he may seek another contractor not bound by such a restrictive union contract.' " (430 F.2d at 909-910, quoted in 446 F.2d at 526-527.)

This reasoning was then placed into the context of the *Western Monolithics* case:

> "The finding of the Board here that Besco was susceptible to coercive action by the union because of its right to control removed the important alternative set forth above. So long as the union is free to view Besco as the target of its activity, Besco cannot 'seek another contractor not bound by such a restrictive union contract.' *The union's complaint here was clearly with West Valley and Nesbit who agreed to the work preservation clause. Its attempts to force them to stop doing business with Besco were lawful primary activity aimed at work preservation.* However, when it expanded

its attack to a threat to Besco it extended the controversy to a protected neutral who had the right to determine its relationship with West Valley and Nesbit and seek other subcontractors who were not bound by the restrictive work preservation clause." (*Id.* at 527, emphasis added.)

In short, the *Western Monolithics* Court determined that the right of control test distorts the primary-secondary dichotomy which Congress established, subjects to economic pressure the party which Congress intended to protect, and immunizes the true primary against whom such pressure is lawful.[25]

This was the posture when the instant case was before the Court of Appeals, prompting that Court to express concern at the possibility that:

> "the Board is prepared to accept the position advanced by *amicus curiae* Chamber of Commerce of the United States that, unless the target of the strike has *both* the power to control the work assigned and a bargaining relationship with the union, the union's economic pressures are illegal secondary activity." (Pet. 26a, n. 29.)

This prospect was viewed with disfavor:

> "There would thus be no primary employer; indeed, in most subcontracting situations the sub-

[25] Bd. Br. 23, n. 17, cites the Ninth Circuit decision in *Associated General Contractors of California, Inc.* v. *National Labor Relations Board*, 514 F.2d 433, 437-438 (C.A. 9) *(AGC)* as approving the right of control doctrine. There is indeed such discussion in the opinion. However, as noted at p. 45, n. 22, *supra*, the validity of the doctrine was not argued by the parties. This explains, perhaps, the panel's reversal, *sub silentio*, of a prior decision within the circuit. Plainly, the *AGC* opinion "lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon*, 416 U.S. 725, 740).

> contractor's employees would be deprived of all economic weapons and all legal mechanisms for preserving their traditional work against onrushing technological changes. * * * so that, in a situation where a union is motivated by a single lawful goal, it is nevertheless adjudged guilty of secondary activity without there being some employer against whom it could have exerted pressure gives the section a harshness which has not heretofore been suggested by its most aggressive proponents." (*Id.*)

The Court of Appeals added, in terms reminiscent of the reasoning of the *Western Monolithics* court:

> "*On the other hand,* when a union's sole objective is work preservation, it would be anomalous to allow it to press its demands on a general contractor with whom it has no ongoing relationship. Rather than limit the scope of labor disputes consonant with the congressional intent expressed in § 8(b)(4), such a result is likely to expand them since it would probably affect all subcontractors on a jobsite." (Pet. 26a-27a, n. 29, emphasis added.) [26]

[26] The first sentence of the foregoing passage, minus the phrase we have italicized, is quoted at p. 23 of the brief *amicus curiae* of the Chamber of Commerce in support of the proposition that where the immediate employer has given up the right of control the union should be allowed to put pressure on no one—not the general contractor, not the supplier of the material, not, in a word, whoever possesses the talismanic "control." The omission is significant because it tends to conceal the context of the quoted passage, which was, as we have shown, a rejection of the Chamber's thesis.

The Chamber's limited quotation also obscures the fact that the *reason* that it is anomalous to allow pressure to be placed on the party with whom there is no employer-employee relationship is, as the court below said in the sentence immediately following that quoted by the Chamber, that Congress' policy in § 8(b)(4)

What the court below feared may already have come to pass. In *Carpenters Local 112 (Summit Valley Industries)*, 217 NLRB No. 129, 89 LRRM 1799, the Board affirmed, without comment, the decision of an administrative law judge who concluded (at pp. 28-29 of his decision) that it was unlawful for the union to put pressure on parties with whom the union was not in contractual "privity". Neither the ALJ nor the Board attempted to reconcile this conclusion with the assumptions of the right of control test, or to justify a result whose consequence was to deny the workers any right to use their economic strength to protect their jobs. See pp. 50-51, *supra*. Nor did the Board explain why it was deciding in the way it was, an issue

was to limit the dispute to the immediate disputants. But, as the court below and the *Western Monolithics* court recognized, the right of control doctrine is antithetical to that policy.

If it be assumed, as does the right of control theory, that the basic dispute is between the employees and the party that does have control, the conclusion that economic pressure may be placed on that party is not anomalous, but entirely logical; indeed, it is compelled by the Act's policy to permit the employees to engage in concerted activities to protect their working conditions. See Part I of this brief.

To be sure § 8(b)(4) does not establish a general policy that concerted activities may be undertaken only in the context of an employer-employee relationship, for it did not repeal the definition of "labor dispute" in § 2(9) which was taken *in haec verba* from the Norris-LaGuardia Act. What § 8(b)(4) does, as we stressed, is to confine the use of direct pressure to the immediate parties to the dispute, who normally, and in this case certainly, are the employer and his employees. Thus, we do not contend that the union may put pressure on both the subcontractor and the general contractor. We do submit, however, that for these reasons, as well as those stated by the Court of Appeals, the Chamber's contention that the affected employees are forbidden from putting pressure on *anyone* to protect their job security, and to protest a breach of the applicable collective agreement, is completely without merit.

it had previously decided the other way.[27] It thus remains true that although the Board has consistently adhered for 17 years to the doctrine that employees may not strike their own employer if he has surrendered the right of control over the content of the work, it has yet to give a principled response to the inescapably connected problem whether pressures may be exerted against the party that does have control. The Board's performance emulates the attitude of the 18th Century legal mind as described by Professor Thomas Reed Powell:

> "If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind."[28]

The legal theory which this kind of administrative decision-making produces should, we submit, be viewed with healthy skepticism by a reviewing court.

In any event, as we have shown in this section of our argument, the right of control theory leads inevitably to one or the other of two choices both of which undermine "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." (*Denver Building*, 341 U.S. at 692, quoted at Bd. Br. 13.) Accordingly, it may not survive.

[27] Quite properly, therefore, the Board's brief does not treat *Carpenters Local 112* as a definitive Board resolution of the question, extending instead a neutral invitation to "[c]ompare" that decision with that of the Board in *Western Monolithics* (Bd. Br. 25, n. 18).

[28] From an unpublished manuscript quoted in Arnold, *Criminal Attempts—The Rise & Fall of an Abstraction*, 40 Yale L.J. 53, 58 (1930).

III. THE LEGISLATIVE HISTORY AND THE PRECEDENTS RELIED ON BY THE BOARD MILITATE AGAINST THE RIGHT OF CONTROL THEORY.

A. *The Legislative History.* The only support for the right of control test which the Board claims to find in the legislative history of the 1947 Amendments is a fraction of a sentence in the House Report on the Hartley bill, which was not enacted. That report is not authoritative, see *e.g., Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 288-289; but even if it were, it could not aid the Board's position. For, when the entire sentence which the Board's brief fragments is read, and particularly when it is read in the context of the entire paragraph, it appears both that the House Report did not "forecast" (Bd. Br. 16) the right of control test, and that the House bill, like the bill that was enacted, regarded an employer-employee dispute over the employee's own working conditions as the hallmark of protected primary activity.

It is said at Bd. Br. 16-17:

> "The test was forecast in the House Report on the 1947 amendments to the Act; the report indicates that it was the intention of Congress to proscribe boycotts where "the employers are powerless to comply with demands giving rise to the [boycotting] activities * * *." H. R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, p. 314 (1958)."

We now set forth the entire paragraph from which the Board has wrested a small portion:

> "(13) 'Sympathy strike.' (14) 'Illegal boycott,' and (15) 'Jurisdictional strike.' The acti-

D. Despite the brevity of the Board's explanation of why it imputes an illegal object to the union where the employer has given up control, our examination of the details of the Board's theory has been lengthy. For the premises articulated by the Board are erroneous in several respect, and even more significantly, its unspoken, and apparently unconsidered assumptions concerning the use of economic weapons are refuted by industrial experience. Yet we do not thereby intend to divert attention from the central propositions of our affirmative case that because Congress decreed the exercise of economic weapons by employees against their employer to protect their working conditions to be the essence of primary activity, which the Act contemplates; that the factors which the Board considers are not those which this Court in *National Woodwork* directed it to consider; and that the result reached by the Board cannot be squared with either of "the dual congressional objectives" delineated in the *Denver* case, 341 U.S. 675, 692 and reaffirmed in *National Woodwork,* 386 U.S. at 626-627. In short, the conclusion of this Court's opinion in *Labor Board* v. *Brown,* 380 U.S. 278, is directly in point here:

> "Courts must, of course, set aside Board decisions which rest on an erroneous legal foundation. *Labor Board* v. *Babcock & Wilcox Co.,* [351 U.S. 105,] 112-113. Congress has not given the Board untrammelled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent. *Labor Board* v. *Insurance Agents, supra,* at 498. In determining here that the respondents' conduct carried its own badge of improper motive, the Board's decision, for the reasons stated, misapplied the criteria governing the application of §§ 8(a)(1) and (3). Since the order therefore rested on an erroneous legal foundation, the Court of Appeals properly refused to enforce it."

vities that these three terms describe have in common the characteristic that they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. *More often than not* the employers are powerless to comply with demands giving rise to the activities, *and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all.* These activities the bill makes unlawful concerted activities under section 12 of the act, and it removes the immunities that the present laws confer upon persons who engage in them." (*Id.*, emphasis added to show the beginning and end of the sentence from which the Board quotes.)

It is thus clear that the absence of the employee-employer nexus of the dispute was the critical characteristic of "illegal boycotts" and the other activities described in this paragraph of the report. It is precisely because the dispute did not involve the employees of the struck employer that he was deemed "[m]ore often than not" powerless to comply with the union's demands, for example, that the employees of the employer with whom the Union had its real dispute should be organized or be paid the union wage.[29]

It can certainly not be said in this case that Hudik and his employees "are the helpless victims of quar-

[29] There is not the slightest indication here or anywhere else in the legislative history (and of course the Board cites nothing) to indicate that the employer was intended to be protected where he was "powerless" because of the greater economic strength of the party with which he is doing business. Indeed, as we develop in our discussion of the *Denver Building* case, pp. 57-60 *infra*, if absence of power over that business relationship were the requisite of "neutrality", much conduct which is now forbidden as a secondary boycott would be lawful.

rels that do not concern them at all". On the contrary, it is Hudik's employees alone who are the victims of Hudik's direction to them to install the units in violation of their agreement which concerns them very much indeed.

B. *Denver Building and Operating Engineers.* It is asserted at Bd. Br. 25 that "the decision of the Board here is consistent with" *Labor Board* v. *Denver Bldg. Council,* 341 U.S. 675, and *NLRB* v. *Operating Engineers,* 400 U.S. 297. The Board is mistaken. Its position depends on a mischaracterization of the ground for this Court's holding that the unions' activity in those cases was illegal. In "both cases the union pressure was secondary" *not* "because it was exerted against a firm that lacked power to grant the union's ultimate demand" as stated at Bd. Br. 27, but because it was exerted against a firm other than the one whose labor relations were the focus of the dispute.

The *Denver* case is particularly instructive. At the outset of the paragraph from which Bd. Br. 26 quotes selectively[30] are two sentences that place this Court's analysis in context:

> "In the background of the instant case there was a longstanding labor dispute between the Council and Gould & Preisner due to the latter's practice of employing nonunion workmen on construction jobs in Denver. The respondent labor organizations contend that they engaged in a primary dispute with Doose & Lintner alone, and that they sought simply to force Doose & Linter to make the project an all-union job." (341 U.S. at 688.)

[30] The court below described the Board's quotation from the same paragraph on brief below (reprinted at Pet. 37a) as "less than candid" (Pet. 39a).

Thus, the Court's discussion was a response to the unions' claim that their primary dispute was with the general contractor. This position was rejected because the Court determined "under all the surrounding circumstances" (*cf. National Woodwork,* 386 U.S. at 644) that the underlying labor dispute was with the subcontractor over *its* labor conditions—that is, its "practice of employing nonunion workmen on construction jobs in Denver" (*id.*). In the present case, of course, we contend, just as the Board did in *Denver* and as this Court determined, that the primary employer is the subcontractor because the dispute is between that employer and his employees over those employees' working conditions.

Contrary to the Board's contention, in *Denver* this Court did not reach that conclusion on the ground that the subcontractor "alone had power to employ union workers and thus to resolve the dispute" (Bd. Br. 25). That proposition is nowhere mentioned in this Court's opinion, and for that reason alone cannot explain this Court's decision.[31] Moreover, the Board's statement is inaccurate. As the Court of Appeals observed "* * * the general contractor in *Denver* had full legal power to assign the work which the union did not want nonunion employees to perform * * *" (Pet. 38a). Indeed, he had the precise

[31] The Board's brief thus employs the same argumentative technique that infected the Board's discussion of *National Woodwork* in *Koch*, 201 NLRB at 63, see p. 21 *supra*. In both instances, the Board supplies to this Court's opinions the statement that the subcontractor (in *Denver*, Gould & Preisner; in *National Woodwork*, Frouge) possessed the right of control, although this Court said nothing of the kind in either case. Then, like the magician it pulls out of both decisions the proposition that the decision turned on the subcontractor's right of control.

right of control held by Austin, the general contractor in this case: *He could terminate the subcontract.* That, as the *Denver* Court recognized, was precisely what the unions' strike against the general contractor was intended to accomplish. This objective was illegal because, the Court having determined the labor relations policy of the subcontractor to have been the focus of the controversy, "the strike against the general contractor was 'tactically calculated to satisfy union objectives elsewhere'." (Pet. 40a, quoting *National Woodwork*). This was, as the Court of Appeals said, a "classic secondary boycott" (Pet. 37a).

It was, of course, unquestioned that the unions in *Denver* could lawfully have picketed the subcontractor provided that they did so in a manner which did not implicate the employees of other contractors and the general contractor on the construction situs, see *Moore Dry Dock Co.,* 92 NLRB 547 and the discussion in *Western Monolithics,* quoted at p. 48 *supra.* That such picketing, if successful, would have made it impossible for the subcontractor to perform the subcontract would not have made the picketing illegal. As the Court of Appeals said:

> "Given *National Woodwork* and the 1959 proviso added to § 8(b)(4)(B), the mere fact that the primary employer, in order to settle the dispute between himself and his employees concerning his 'labor relations * * * *vis-á-vis* his own employees,' might be forced to terminate his contract with such a third party cannot alter this conclusion." (Pet. 40a.)

This was clearly correct under *National Woodwork,* 386 U.S. at 627 and the other precedents in Part I of

this brief, culminating in *Operating Engineers,* 400 U.S. at 304.

If the union in the present case had, in its dispute with Hudik, picketed Austin, the general contractor, *then* there would have been a violation of the Act under *Denver.*[32]

C. *Sand Door.* The Board's last point is that "the Union's contract with Hudik does not give it license to engage in unlawful secondary pressures" (Bd. Br. 27, heading). That proposition is incontrovertible. For, as stated at Bd. Br. 29, citing *Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 105 (*Sand Door*), whether the union's pressure on Hudik is primary or secondary depends on the criteria for differentiating the two types of activity, "criteria that Congress has incorporated in the Act;" the parties cannot by contract con-

[32] Some of the *amici curiae* speak grandly of the "right" of the general contractor, architect, engineer, etc. to make specifications. We assume, arguendo, that the union is not privileged to interfere with that "right" by engaging in direct economic pressure against these entities. But they, in turn, have no right to co-opt the labor of a group of employees to install the products which are manufactured according to their specifications any more than they have a right to require the employer of those workers to enter into a contract to use those specifications. Their economic power may be sufficient to make it highly desirable for that employer to do so, but the Act does not protect him against the economic pressure of his employees to choose *not* to do it, nor does it protect the specifiers from the consequence of that refusal. That consequence is the same as in any successful strike. Again, the *Denver* case provides an instructive analogy. If the union in that case had been able to shut down the subcontractor successfully, the general contractor would have been unable to finish the project, unless he retained another subcontractor; so here, Austin would not succeed in having its climate control units installed unless it obtained another subcontractor whose employees were willing to perform the work.

vert into primary activity that which the statute makes secondary (Bd. Br. 29). Thus, the basic issue in this case is whether under the "criteria that Congress has incorporated in the Act" the union's activity is primary or secondary; it is for that reason that our argument began by identifying these criteria, and why the right of control test, which is a Board construct without Congressional provenance, cannot govern the rights of the parties. More narrowly, it is for that reason that the Board's determination that the union had a "valid work preservation clause in the agreement with Hudik" (Pet. 141a), is dispositive. The brief's discussion of *Sand Door*, and indeed its entire argument, fails to confront the necessary legal consequences from that determination, for given § 8(e) of the Act, a strike to implement a lawful agreement is also primary under the "criteria that Congress has incorporated in the Act" (Bd. Br. 29).

Section 8(e) reversed *Sand Door* insofar as it held that a secondary agreement could "have legal radiations affecting the relations between the parties" (357 U.S. at 108) even though enforcement by the means described in § 8(b)(4) would be a violation of the Act. (This is fully developed in *National Woodwork,* 386 U.S. at 634). The *National Woodwork* Court held also that § 8(e), like the other "loophole-closing" measures enacted in 1959, did not alter the primary-secondary dichotomy, *id.* at 635-642. Thus, since the agreement that the employees would not be required to install climate control units unless they would also perform the work of cutting and threading piping was lawful under § 8(e), their refusal to perform that work, which they were directed to do in violation of that agreement, was not forbidden by § 8(b)(4)(B). *Id.* at 645-646.

In short, only primary agreements are lawful under § 8(e); § 8(b)(4)(B) and § 8(e) embody the same criteria; *therefore,* maintenance of an admittedly lawful agreement by refusing to perform work which does not comply therewith is likewise unmistakably primary.

The Court of Appeals did not, as Bd. Br. 27-29 insinuates, treat the agreement herein as validating a strike which would have been secondary but for the agreement. The significance which that court attributed to the agreement, and properly so, was two-fold: (1) it was one of the "surrounding circumstances" which showed that the union's refusal to install the climate control units was primary activity directed at the union's relationship with Hudik rather than "tactically calculated to satisfy union objectives elsewhere" (386 U.S. at 644), (see p. 4, *supra*); and (2) it further demonstrates the incongruity—indeed, the fundamental inconsistency with the Act's basic structure and purposes—of the Board's treating Hudik as a neutral. As the Court of Appeals said:

> "Thus, to accept the Board's characterization of Hudik-Ross as a neutral bystander under these circumstances would allow the 'Cinderella-like transformation of an obviously involved party,' and would both render nugatory the commitment which Hudik-Ross made and demean the collective bargaining process which is the cornerstone of labor relations in the United States." (Pet. 20a-25a).

The foregoing objection was met by the Board in *Koch* with the suggestion that the union's "remedy may well lie in a civil suit for breach of contract,"

201 NLRB at 63 (citing *Sand Door!*). The dissenting opinion in the court below also embraced the suggestion, see Pet. 110a-116a, 120a-132a. The majority below correctly rejected this palliative:

> "It is sufficient to observe that the suggestion—that an agreement to preserve work from *nonjobsite* prefabrication is legal and enforceable in court even though it obligates the employer to do that which the union could not exert economic pressure to force the employer to do—is completely untenable in light of the congressional overruling of *Sand Door* by the passage of § 8(e) and the *National Woodwork* Court's formulation of the *in pari materia* relationship of §§ 8(e) and 8(b)(4)(B). *See* 386 U.S. at 644-45 (majority opinion); *id.* at 649 (memorandum of Mr. Justice Harlan) ('§ 8(e), it is agreed, is to be taken *pari passu'* with § 8(b)(4)(B)); *id.* at 660, *quoting Ohio Valley Carpenters,* 136 NLRB 977, 987 (1964) (Stewart, J., dissenting) ('there is little point and no logic in declaring an agreement lawful under 8(e), but in finding its enforcement condemned under 8(b)(4)(B)')." (Pet. 35a-36a, n. 39, emphasis in original.)

In sum, we agree with Bd. Br. 29: "But whether the Union's pressure on Hudik is primary or secondary depends on the criteria for differentiating the two types of activity, criteria that Congress has incorporated in the Act." It follows, we submit, that Hudik cannot by contract convert into *secondary* activity that which the statute makes *primary.* The precedent which addresses this problem is not *Sand Door,* but *Carrier* (*Steelworkers* v. *Labor Board,* 376 U.S. 492). There, it was argued that picketing which would otherwise be primary was unlawful because it was not at the factory gate owned by the struck employer, but

at an entrance to the struck facility owned by the neutral railroad. The argument was rejected: "[Carrier] would distinguish between picketing an entrance to a struck plant which is owned by the primary employer and picketing a gate *which by design or otherwise had been conveyed to a neutral* furnishing delivery service, an anomaly which we do not believe Congress intended" (376 U.S. at 501, emphasis added). Although the facts are different here, it would be no less anomalous to allow an agreement between the employer and another party to deprive the employees of the right to engage in primary activity—here a strike to protect their job security. For, while the *Carrier* opinion did not articulate the principle underlying this part of the decision—doubtless because it was deemed self-evident—it must be that when Congress guaranteed the right to strike so that employees might have equal bargaining strength with their employers, it did not license those employers, acting in their own self-interest, to convert that right into a wrong.

CONCLUSION

As the Court of Appeals said, the Board's right of control test "is a continuing inducement for employers to violate their bargaining agreements", and "demean[s] the National Labor Relations Act by encouraging deliberate, if not always planned, violations of bargaining agreements" (Pet. 34a-35a). Moreover, it nullifies the right vouchsafed by the Act, as construed in *National Woodwork,* to enter into and enforce work preservation agreements, and "strike[s] from workers' hands the economic weapons traditionally used against their employers' efforts to abolish their jobs" (386

U.S. at 640). The doctrine should be disapproved, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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I

The "essence" of respondent's "case is that a strike by employees against their own employer in defense of their own working conditions is protected primary activity, not a prohibited secondary boycott" (Br. 9). Almost all of the Union's presentation is devoted to showing the legitimacy of strikes about working conditions; we have no quarrel with much of this presentation. But the step from this premise to the Union's conclusion that its activity here was lawful requires the assistance of a

further assumption: that if economic pressure has a (legitimate) primary object, it cannot have a (forbidden) secondary object as well. Unless the Court agrees with the Union that pressure with a primary object cannot also have a secondary object, the Union's argument cannot prevail. We submit that the assumption is unfounded and that, as a result, the Union's argument—that all disputes between employees and their employer are permitted by the Act—is incorrect.

A few examples suffice to show the error of the Union's position. (1) A controversy over whether the employees of a unionized employer shall be required to work on the same job site with the employees of a nonunion employer, or whether union employees shall be required to handle goods produced by nonunion employees, involves a dispute over the "working conditions" of the union employees and implicates the employee-employer relationship. Yet is is clear that a strike against their employer in order to eliminate the conditions mentioned would have a secondary object and thus violate Section 8(b)(4)(B) of the Act. See *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675; *Local 1976, Carpenters* v. *National Labor Relations Board (Sand Door)*, 357 U.S. 93. (2) Union efforts to acquire for employees covered by a work preservation agreement a different type of work than they previously had performed may provoke a dispute with their employer concerning their "working conditions," but pressure to obtain such work has a secondary object and hence is unlawful. See cases cited at pages 24-25 of our opening brief.

The fact is that some economic pressure directed against the immediate employer of the employees may be an attempt to conscript the employer into the Union's campaign against third parties. When that happens, the economic pressure has a secondary object. A proper accom-

modation of the competing interests involved,[1] and due regard for the fact that Section 8(b)(4)(B) proscribes activity if "an" object is secondary (*Denver*, *supra*, 341 U.S. at 689), requires the recognition of this possibility. As a result, the activity in this case cannot be approved simply because the Union may have been concerned about the working conditions of Hudik's employees.

When a union brings pressure on an employer to obtain work the employer has no right to control, it gives every necessary indication of having an object beyond influencing that employer's decision. It cannot succeed unless it can conscript the aid of the employer to bring pressure on third parties in order to change their decisions. In this case the Union could have obtained the work it sought only if it (with Hudik's aid) could have induced Austin to alter Austin's specifications and its business relations with Slant/Fin.[2]

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[1]In *Denver*, *supra*, 341 U.S. at 692, the Court indicated that Section 8(b)(4)(A) of the Act (now Section 8(b)(4)(B)) should be interpreted so as to foster "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."

[2]The opinion of the court of appeals appears to recognize this (Pet. App. 22a, n. 25):

> [T]he ALJ in this case asked rhetorically: "[I]f Hudik, an employer of union steamfitters, does not bid on jobs and does not secure subcontracts, how does such a situation preserve or increase work for Hudik's union steamfitters[?]" * * * Yet he unknowingly answered that question himself earlier in this opinion: "If prepaid [sic] units cannot be installed * * * Austin and other engineers and general contractors will not specify their purchase and use in buildings."

In contrast to *National Woodwork*,[3] where the union could have accomplished its design by changing the decision of Frouge alone, here the Union's efforts could not have succeeded without changing Austin's decision as well as Hudik's.[4] It was reasonable, therefore, for the Board to conclude that forcing a cessation of, or change in, business relations, although "incidental" in *National Woodwork*, was "an" object of the Union here.

II

The Board's conclusion that the Union engaged in unlawful secondary activity is not inconsistent with the Board's assumption that the refusal of the Union "to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, * * * and was for the purpose of preserving work they had traditionally performed" (Pet. App. 141a). That a work preservation clause is "valid" means no more than that it can be legitimately enforced in one or more applications (as was true in *National Woodwork*); its validity does not imply that its enforcement with a secondary object, by means proscribed by Section 8(b)(4), also is legitimate.[5]

---

[3] *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612.

[4] In concluding that the activity in *National Woodwork* was primary, the Court relied, *inter alia*, on the fact that, under *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, Frouge would have been obligated to bargain with the union over the contracting out of the work in question. *National Woodwork*, *supra*, 386 U.S. at 642-643. As the Board pointed out in *George Koch Sons, Inc.*, 201 NLRB 59, 63 n. 22, an employer could not be compelled to bargain over the contracting out of work that it never controlled.

[5] No charge was filed with the Board challenging the clause under Section 8(e) of the Act, 29 U.S.C. 158(e), which makes it unlawful "to enter into" a secondary boycott agreement. A proviso to Section 8(e), however, allows such agreements in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." But an agreement protected by the proviso cannot be enforced by means which would constitute restraint and coercion within the meaning of Section 8(b)(4) (see our opening Br. 30 n. 21).

The Union's argument that it is always legitimate primary activity for employees to seek to "enforce" a "valid" contractual agreement with their employer devolves into the argument that no dispute with an immediate employer can have a secondary object. We have already explained why this argument is incorrect. If, as we have argued, the Union cannot use an employer as its cat's paw in a dispute with someone else, it stands in no better shoes if it induces an employer to sign an agreement promising to help the Union attain its secondary object and then uses economic pressure to enforce that promise. The Union's object to affect the decisions of third parties remains the same; the device it uses (economic pressure against an immediate employer) is the same; and the employer's responsive promise to do what it can to help the Union therefore avails the Union nothing.

The Board's position that a valid agreement may not be used to provide a shield for otherwise unlawful secondary activity is not "incompatible with the system of collective bargaining established by the Act" (Union Br. 26).[6]

---

[6] The Union seems to suggest (Br. 27) for example, that the Board would find a secondary object in an employer's decision not to bid on a contract that would not produce revenues sufficient to pay its employees' wages. This hyperbolic example, and the others following it, are illuminating: in all of them the employer had a right to control the work in question. Because the right to control the plumbing in the Slant/Fin units is lacking here, the situation is different. The Union has not produced any example in which the employer lacks the right to control, yet the Union's activity is "obviously" primary.

The parties cannot by contract convert into primary activity that which the statute makes secondary. See *Local 1976, Carpenters (Sand Door), supra,* 357 U.S. at 105.[7] The irrelevancy of the agreement to the question whether the Union's conduct violated Section 8(b)(4)(B) of the Act is further demonstrated by the decision of the court below in *Local 742, Carpenters* v. *National Labor Relations Board,* 533 F. 2d 683 (C.A. D.C.), petitions for writs of certiorari pending, Nos. 75-1706, 75-1755, in which the court disapproved the Board's finding of a Section 8(b)(4)(B) violation, in a situation comparable to that here, even in the absence of a work preservation agreement (see our opening Br. 28, n. 19).

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

---

[7]Although the agreement in *Sand Door* was a secondary boycott agreement which would now be unlawful under Section 8(e) (see n. 5, *supra*), such agreements were not unlawful at the time that case was decided. This Court nonetheless held that a strike to enforce a lawful secondary boycott agreement came within the terms of, and thus was barred by, Section 8(b)(4)(A) (now Section 8(b)(4)(B)) of the Act.

Respectfully submitted.

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IN THE

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v.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AMICUS CURIAE

To the Honorable, the Justices of the United States Supreme Court:

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves the Court to grant it leave to file the attached Brief which is herewith lodged with the Court. In support whereof, the Chamber states:

1. This case presents an issue of national importance in the administration of the National Labor

Relations Act: the validity of the Board's "control" doctrine as applied to determine whether an employer subjected to boycott pressures by a union, is protected from such coercion by Section 8(b)(4)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(B).

2. The Chamber, as the nation's largest association of employers,* frequently participates as an *amicus curiae* in cases of national impact even when individual employers are also party to the lawsuit. See, *e.g.*, cases cited p. 2, *infra*. Here, however, none of the party-employers has participated in the litigation before the Court of Appeals. The Chamber's participation will fill the void created by their absence.

3. The issues in this case are of major importance to the Chamber's members, many of whom are actively engaged in the construction industry or are users of services provided by construction concerns. These members are directly affected by the scope of permissible pressures labor organizations may direct against contractors at jobsites to enforce product boycotts under "work preservation" agreements. The Chamber is thus vitally concerned that it have an opportunity to represent these affected interests before the Court. Otherwise the views of the contractors subject to the Union's pressures in this case as well as the views of American industry will be unrepresented in this proceeding. And the broad membership interests represented by the Chamber places it in a position to bring to the Court's attention considerations which might not be addressed by the particular parties to this litigation.

* The Chamber is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals.

4. The Chamber has participated in the instant case as an *amicus* in the Court of Appeals, and the Court on February 23, 1976, granted the Chamber's motion to file a Memorandum in support of issuance of a petition for a *writ of certiorari* in the instant case.

WHEREFORE, the Chamber prays the Court to grant it leave to file the following Brief as *amicus curiae* in the above captioned case.

Respectfully submitted,

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IN THE

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE [1]

INTERESTS OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-

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[1] This Brief is filed contingent upon the Court's granting the accompanying Motion for Leave to Submit, *supra*.

two thousand (52,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to the Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relation matters considered by the Court. *E.g., McDonald* v. *Santa Fe*, — U.S. — (No. 75-260); *Hudgins* v. *NLRB*, — U.S. —, 96 S.Ct. — (1976); *Connell Constr. Co.* v. *Plumbers, Local 100*, 421 U.S. 616 (1975); *William E. Arnold Co.* v. *Carpenters*, 417 U.S. 12 (1974); *Super Tire Engin. Co.* v. *McCorkle*, 416 U.S. 115 (1974); *Boys Markets* v. *Local 770, Retail Clerks*, 398 U.S. 235 (1970); *Porter* v. *NLRB*, 397 U.S. 99 (1970).

The issues in this case are of major importance to the Chamber's members many of whom are actively engaged in the construction industry or are users of services provided by construction concerns. The issues posed herein, which include the validity of the Board's control standard as the major factor separating lawful from proscribed conduct under Section 8(b)(4)(B) of the National Labor Relations Act (29 USC § 158(b)(4)(B)), are of immediate concern to the Chamber's members. These members are directly affected by the scope of permissible pressures labor organizations may direct against contractors at jobsites to enforce product boycotts under "work preservation" agreements. The Chamber is thus vitally concerned that it have an opportunity to represent these

affected interests before the Court. Otherwise the views of the employers affected by the Union's pressures in this case as well as the views of American industry will be unrepresented in this proceeding. And the broad membership interest represented by the Chamber places it in a position to bring considerations to the Board's attention which might not be advanced by the particular parties to this litigation.

STATEMENT OF THE CASE

I. The Uncontested Facts

The Austin Company of Roselle, New Jersey ("Austin") was engaged as the general contractor for construction of the Norwegian Christian Home for the Aged in Brooklyn, New York. 204 NLRB at 760, 762.[2] Austin has no contract with Plumbers, Local 638 ("the Union") and does not employ plumbers or steamfitters. 204 NLRB at 762. Austin was also hired to engineer all job specifications for this construction project. 204 NLRB at 760, 762. These specifications included one requiring the installation of certain combination cooling and heating units to be manufactured by Slant/Fin Corporation of Greenvale, New York ("Slant/Fin").[3] The units, after purchase by Austin,

[2] References are to the Decision and Order of the National Labor Relations Board, reported at 204 NLRB 760.

[3] This specification provided in relevant part:

> Furnish at the jobsite Slant/Fin Climate Command Air Conditioners. The unit shall be complete with cabinets, filters, cooling chasis, heating coil fans, main water flow and condensate assembly . . . . The main flow and condensate assembly shall be factory installed as an integral part of the unit by the manufacturer . . . . Manufacturer shall furnish a written guarantee for a period of one year after completion of installation . . . .

carry a one-year guarantee if the internal piping is fabricated at the factory by Slant/Fin. 204 NLRB at 762. Slant/Fin has no contractual or other relationship with the Union, and it is uncontested that the Union has never sought a contract with Slant/Fin nor attempted to organize Slant/Fin's employees. 204 NLRB at 763.

Following the submission of competitive bids, Austin, on January 14, 1972, awarded the heating, cooling and ventilation work on the Norwegian project to Hudik-Ross Co., Inc. ("Hudik"). 204 NLRB at 760, 762. This work included installation of 114 Slant/Fin heating and cooling units purchased by Austin, and Hudik "was aware that the units it was to install contained internal piping that had already been cut and threaded." 204 NLRB at 760. Hudik is party to a collective bargaining agreement with the Union which includes "Rule IX". This provision provided in pertinent part (204 NLRB at 762):

> Radiator branches, converter branches and coil connections shall be cut and threaded by hand on the job . . .

Shortly after the Slant/Fin units were delivered to the jobsite on June 22, 1972, Union business agent William B. Daly informed Frank Hudik, President of Hudik, the units would not be installed because the piping inside the units was steamfitters' work. Daly contended Rule IX required internal piping in the units to be cut and threaded at the jobsite. 204 NLRB at 762. Frank Hudik told Daly these units were "part and parcel of the plans and specifications," that Hudik "had no choice in the matter," and that Hudik "did not buy this equipment." 204 NLRB at 762.

Daly also told Austin's project superintendent, Plath, that Hudik's employees would not install the units. 204 NLRB at 760, 762. The Union continued to refuse to permit Hudik's employees, who are members of the Union, to install the units, and at frequent intervals until at least September 1972, Union steward Zimmerman told Plath that Hudik's employees "were still under instructions from the Union not to install the Slant/Fin units." 204 NLRB at 763. As of the time of the unfair labor practice hearing on November 15, 1972, the Union still refused to install these units.

II. The Decisions Below

The Board concluded that the object of the Union's work stoppage was either to force "a change in Austin's manner of doing business [with Slant/Fin] or [to force] Hudik to terminate its subcontract with Austin." 204 NLRB at 760. Since Hudik could not reassign the completed thread work to its employees and thus was powerless to meet or satisfy the Union's demands, the Board applied its control doctrine to conclude that the Union's coercive pressure was not lawful activity. Rather, this conduct was undertaken for its effect on other employers like Austin and Slant/Fin whose specification practices and manufacturing methods were inconsistent with the Union's interests.

The Board noted that the Union did not limit the focus of its conduct to Hudik. The Union directly and repeatedly informed Austin that "it would not let Hudik install the [Slant/Fin] units involved." 204 NLRB at 760. Accordingly, the Board held the

Union's work stoppage was a secondary boycott which violated § 8(b)(4)(i) and (ii)(B) of the Act.[4]

Sitting *en banc* and with four circuit judges dissenting, the Court of Appeals remanded the case for further proceedings. 521 F.2d 885. The majority opinion disagreed with the Board's legal analysis and its factual finding. The majority considered the control standard to be a *per se* test, incompatible as a matter of law with this Court's interpretation of § 8(b)(4)(B) in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967). The majority stated (521 F.2d at 903): "We do not think that an employer who is struck by his own employees [to enforce a valid work preservation clause] can ever be considered a neutral bystander in a dispute not his own." With respect to the Board's factual findings, the majority concluded (521 F.2d at 903) the Union's work stoppage did not itself "[indicate] that the substance of the dispute was with a third party." The majority minimized the Union's contact with Austin's jobsite representative, labeling this "single occasion," as "no more than [what] Hudik should have done . . ." 521 F.2d at 900 n.36.

The Court granted the Board's petition for a writ of certiorari on February 23, 1976.

SUMMARY OF ARGUMENT

The public policy underlying §§ 8(b)(4)(B) and 8(e) of the National Labor Relations Act protect business relationships which are outside the legitimate scope of the union's representational interests, from the disruptive impact of labor disputes. Congress did not

[4] This statutory provision, along with § 8(e) of the Act, is set forth in the Appendix attached to this brief.

attempt the impossible task of cataloging every instance where labor activity would have this adverse economic consequence. Accordingly, the statutory language of these sections suggests no criteria for distinguishing unlawful boycotts from those which have an incidental disruptive impact upon employers.

The evidentiary control standard is a valid and rational basis for distinguishing "incidental" cease doing business effects from predominate unlawful efforts to terminate or alter existing business relationships. This test properly focuses upon the relationships between the pressured employer and the other employers engaged in a common enterprise. These relationships reveal the actual options available to the pressured employer to respond to the union's demands. The right of control standard also permits examination of the direct or indirect benefits which accrue to the bargaining unit as a result of union enforcement of the work preservation clause, identification of the employer with whom the union actually has a dispute, the degree of interference with the labor relations of other employers, and the economic impact on the industry resulting from literal interpretations of work preservation agreements.

Where jobsite enforcement of such agreements confers no actual work preservation benefits upon the bargaining unit, forces construction contractors off job projects or forecloses bidding entirely where specifications reflect modern production methods, and pressures third party employers to modify or eliminate proficient manufacturing processes or abandon an available market, § 8(b)(4) precludes a labor organization from striking or picketing at the jobsite to enforce work preservation clauses.

§ 8(b)(4) also prevents labor organizations from picketing "stranger" employers to enforce work preservation agreements. Absent managerial assent to confer certain work upon union represented employees, there is no obligation owed the union which can cause a labor dispute with a non-signatory contractor, supplier or manufacturer. Non-signatory employers are not obligated by any contractual language to assign work or structure manufacturing methods in a manner dictated by union interests. Non-signatory employers are strangers *vis-a-vis* the pressuring union, and thus are not required to maintain job content to afford maximum job opportunities for union members. The work preservation concept defined in *NLRB* v. *National Woodwork Mfrs. Assn.*, 386 U.S. 612 (1967), legitimizes work preservation only for an existing bargaining unit which, of course, presupposes a bargaining representative who has previously obtained such a contractual clause from the employer.

If direct coercive pressure against non-signatory employers were outside the reach of § 8(b)(4), unions could force radical restructuring of the business methods and relationships of third parties which would necessarily widen the adverse economic consequences of labor disputes in direct controversion of federal labor policy expressed in this provision of the Act. The consequences of such conduct upon individual employers would also substantially undermine their ability to resist bargaining demands made upon them by their employees, thereby undermining the free collective principle established by the National Labor Relations Act. This in turn would grant labor organizations economic power well beyond that legitimately derived from the representation of employees, and would radically

undermine the balance between labor and management struck by Congress in the Taft-Hartley amendments to the Wagner Act. 93 Cong. Rec. 7690-91 (1947) (remarks of Senator Taft).

ARGUMENT

I. THE CURRENT SCOPE OF JOBSITE ENFORCEMENT OF WORK PRESERVATION AGREEMENTS

In *National Woodwork* [5] a bare majority of the Court upheld a "work preservation" defense, and reversed the unlawful boycott ruling of the Seventh Circuit. In so doing, the Court acknowledged that the union's jobsite strike was literally within the statutory proscriptions of § 8(b)(4)(B) of the National Labor Relations Act, but escaped this result by concluding, in the particular circumstance presented, the union's strike was outside the "spirit" of the statute. 386 U.S. at 619 (citing *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892)).

This narrow holding involved one boycotted employer, Frouge Corporation, a general contractor hired to construct a housing project at a jobsite in Philadelphia. Neither the job specifications nor Frouge's contract with the project owner required that doors be precut, prefitted, or premachined. Frouge ordered premanufactured doors for this project from a door manufacturer, although "blank" doors would have been equally appropriate. Frouge hired carpenters from the Philadelphia area to perform jobsite work pursuant to an existing contractual relationship with the carpenters' union. This contract required signatory contrac-

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[5] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967) (hereafter "*National Woodwork*").

tors to abide by local work rules, including one which prevented union members from handling any precut or prefitted millwork.[6] When the premachined doors ordered by Frouge arrived at the jobsite, Frouge's carpenter employees engaged in a work stoppage and refused to hang the doors.

The Court reasoned that the sole purpose of the union's boycott was to preserve or reacquire jobsite work tasks which Frouge had unilaterally denied bargaining unit employees. The labor dispute arose solely because Frouge in effect had assigned jobsite work to employees of the door manufacturer. Severance of Frouge's existing business relationship with that manufacturer was considered merely an "incidential" effect of the union's boycott, a consequence inherent in Frouge's reassignment of the jobsite work to his employees. The Court construed § 8(b)(4)(B) to be inapplicable to coercive jobsite pressures directed solely at one employer to persuade him to abide by his contractual promise to assign work to bargaining unit members, where that same employer could simply reassign the work to meet the union's demand and thereby end the labor dispute.

The Court expressly reserved the question presented in the instant case. 386 U.S. at 617-17n.3. That is,

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[6] This contractual provision provided in pertinent part:

> No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted.

Any subcontracting clause not limited to a particular is unlawful under § 8(e) of the Act. *Connell Constr. Co.* v. *Local 100, Plumbers*, 421 U.S. 616, 626, 631, 633, 635 (1975).

whether § 8(b)(4)(B) bans coercive pressure allegedly to further work preservation against a boycotted employer powerless to resolve the labor dispute which he did not cause. We show below that *National Woodwork* does not authorize jobsite strikes in these circumstances. Indeed, the reasoning in that case supports the Chamber's position that the Union's strike ostensibly against Hudik was for the unlawful § 8(b)(4)(B) purpose of forcing the general contractor Austin to cease an existing business relationship with the manufacturer Slant/Fin or to force Slant/Fin to change its production methods to accord with the Union's interest. We further show that § 8(b)(4)(B) bans coercive conduct solely for a work preservation object directed against employers who do not employ members of the pressuring union and who have no contractual obligation to make job task assignments in accord with union wishes.

II. COERCIVE JOBSITE CONDUCT WHICH FORCES OR REQUIRES CESSATION OF EXISTING BUSINESS RELATIONSHIPS OR MODIFICATIONS OF OBJECTIONABLE PRODUCTION METHODS VIOLATES § 8(b)(4)(B) OF THE ACT

In that portion of *National Woodwork* which did not reach the Court, the Board drew a distinction between boycotted contractors like Frouge who retain unilateral authority at the jobsite to assign work to bargaining unit employees and contractors like Hudik whose job assignment prerogatives are limited or extinguished entirely by the project owner, the architect, the designer or the general contractor of the construction project.

Thus, three contractors, other than Frouge, also contracted with owners for construction of various buildings in the Philadelphia area. The specifications for

these projects mandated prefitted or prefinished doors. When these doors arrived at the various jobsites, the carpenters employed by each contractor engaged in a work stoppage and refused to hang the doors. The Board concluded and the Seventh Circuit agreed [7] that the union's jobsite strikes violated § 8(b)(4)(B). The Board reasoned (149 NLRB at 658):

> As the specifications required the use of precut or prefit doors and the three contractors were required by contract to follow the specifications absent the consent of the owners of the respective projects to a change, the work of cutting out and fitting doors was thereby assigned by the owner to the mill suppliers and the general contractors were merely selected by the owners to carry out this predetermined assignment. The specifications thus effectively deprived these three general contractors of control of the assignment of this work and rule 17 of their contract therefore was no longer applicable. They could not grant the District Council's request that the work of cutting out and fitting doors be done on the jobsite, and were powerless to settle the dispute, because that work was nonexistent.

This is also the situation here. Hudik did not cause the labor dispute which arose when air-conditioning units arrived at the jobsite with a small portion of the steamfitter work already completed. It is undisputed that Hudik did not make the decision which left its employees without this portion of their jobsite tasks. Hudik played no part in the specifications formulated by Austin.[8] Frank Hudik, President of Hudik, told

[7] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 354 F.2d 594 (7th Cir. 1965), *enforcing in pertinent part*, 149 NLRB 646 (1964).

[8] Most contractors are not aware of all project specifications at the time bids are submitted to the prime contractor.

Union business agent William B. Daly that these units were "part and parcel of the plans and specifications," that Hudik "had no choice in the matter" and that Hudik "did not buy this equipment" (*supra*, p.—) Unlike Fr[illegible]uge, Hudik did not unilaterally take jobsite work away from bargaining unit employees.[9] It is disingenuous to suggest as did the Court below (521 F.2d at 895) that Hudik should not have bid at all on the Norwegian project once it learned that some jobsite tasks had been assigned to Slant/Fin's employees by Austin's job specification. Such an alternative deprives bargaining unit employees of all work and decreases Hudik's profitability to the direct economic detriment of the bargaining unit employees. This consequence is wholly contrary to the employment interest of bargaining unit employees which the Court below purported to uphold, nor consistent with the "work preservation"

[9] Hudik's contractual promise to the Union is a limitation only upon Hudik's discretion to make work assignments. Hudik had no authority to limit the work assignment freedom of other contractors. Absent an express indication to the contrary in the contract, Hudik cannot be said to have agreed to indemnify the Union for work assignments made exclusively by other employers. As the Board reasoned in that portion of its *National Woodwork* decision cited above, a work preservation clause does not apply to a situation where the job assignment has been made by a third party. Since the promisor (Hudik) has not breached his promise to the Union, no contractual remedy is available, and coercive efforts to compel arbitration would also violate § 8(b)(4)(B). *Associated General Contractors* v. *NLRB*, 514 F.2d 433, 438, 439 (9th Cir. 1975) (3½ days work stoppage and monetary assessment unilaterally imposed by arbitration board coercive within § 8(b)(4)); *Acco Constr. Equip., Inc.* v. *NLRB*, 511 F.2d 848, 852 (9th Cir. 1975) (unilateral imposition of fines pursuant to arbitration clause coercive within § 8(b)(4)(B).

Union efforts to exact pay for a bargaining unit from a signatory employer in return for no work at all at the jobsite would violate § 8(b)(6) of the Act. *American News Pub. Assn.* v. *NLRB*, 345 U.S. 100, 110 (1953).

objectives it ascribed to the union. It is simply unreasonable to construe Hudik's promise to assign work to unit employees to include putting himself out of business, or at a minimum as agreement to serious dimunition or his economic viability.

Coercive jobsite condct to force a signatory contractor to reassign bargaining unit work where the disputed work assignment has been made by a third or even a fourth party not obligated by contract to respect the union's interest in maximizing jobsite work is not privileged conduct because it does not affect the labor relations of the boycotted employer. Resolution of this dispute is entirely beyond the capacity of the signatory contractor. The only party who can resolve the dispute is the owner or other person who made the job specifications. This part must either sever its contractual relationship with the signatory and replace this contractor with a non-union employer, or pressure the owner to change the specifications and order the materials from another supplier, thereby severing entirely an existing business relationship. The first option cannot be the union's purpose because, rather than preserving work for the bargaining unit, literal compliance with the union's demands necessarily forces the signatory off the jobsite, thereby depriving the bargaining unit of *all* work.

The cease doing business consequences of the second option cannot fairly be regarded as merely "incidential." These existing business relations directly affected by the boycott do not involve the struck employer. This relationship is that of the project owner and the party charged with formulating construction specifications. These are the parties whose work assignment affected the jobsite tasks. But these parties have no contractual or other obligation to regulate their

conduct in accord with the union's interests. These are the parties who may be able to resolve the dispute, but only by terminating the relationship or by restricting production methods to permit all fabrication work to be done at the jobsite. Strikes and work stoppages to force such consequences have long been regarded as beyond the reach of union boycott activities. *NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297, 304-05 (1971); *NLRB* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 688 (1951). Any other result eliminates the freedom of a prime contractor to bid on job projects with cost saving specifications and to engage reliable subcontractors to perform necessary jobsite work, and would further prevent subcontractors from bidding on available work which their employees were particularly proficient at performing. In such circumstances it is not only reasonable but imperative to infer that an object of the union's boycott is not to force the boycotted employer to perform the impossible act, of reassigning non-existant work to bargaining unit employees, but to force manufacturers to abandon or modify cost saving production methods or to force prime contractors to abandon suppliers who insist on such methods.

The pressuring union is properly liable for these foreseeable consequences of its jobsite pressure. *Local 761, Elec. Wkrs.* v. *NLRB,* 366 U.S. 667, 674 (1961); *Radio Officers' Union* v. *NLRB,* 347 U.S. 17, 45 (1954); cf. W. Prosser, *The Law of Torts.* ¶41 (3d ed. 1964).[10] This is particularly so here because if the Union's purpose was to force Austin to replace Hudik at the jobsite, its strike would directly violate § 8(b)(4)(B).

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[10] "It is not expected that the officers or representatives of a union will record unlawful motivation in such a way as to constitute direct evidence." *NLRB* v. *Local 340, Elec. Wkrs.,* 301 F.2d 824, 825 (9th Cir. 1962).

NLRB v. *Denver Bldg. & Constr. Trades Council*, *supra*. The Union tacitly indicated that its real concern was the existing relationship between Austin and Slant/Fin by repeatedly telling Austin's project superintendent, Plath, that Union members would not install the Slant/Fin air-conditioning units (*supra*, p.).

Coercive jobsite conduct which directly affects the business relationships of non-signatory parties cannot be sanctioned merely because the signatory contractor could not give full content to a contractual promise to assign all jobsite work to his bargaining unit. *Local 5, Plumbers* v. *NLRB*, 321 F.2d 366, 371 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963). Otherwise labor organizations (and employers) could repeal Congressionally enacted prohibitions on the exercise of economic weapons by contractual agreement. *Local 1976, Carpenters* v. *NLRB*, 357 U.S. 93, 104-08 (1958); cf. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 365 (1940). The mere fact that a contract exists between the pressuring union and the boycotted employer does not render him subject to all strike and other coercive pressures. *Local 636, Plumbers* v. *NLRB*, 278 F.2d 858, 864 (D.C. Cir. 1960). *National Woodwork* recognized that the boycott provisions of the Act also protect signatory contractors used by union to conceal an unlawful boycott.

> In effect Congress, in enacting § (b)(4)(A) of the Act, returned to the regime of *Duplex Printing Co.* v. *Deering*, [254 U.S. 443 (1920)] and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.*, [274 U.S. 37 (1926)], and barred as a secondary boycott union activity directed against a neutral employer, *including the immediate employer* when in fact the activity directed against him was carried on for its effect elsewhere. (emphasis supplied). 386 U.S. at 632.

Congress has not relaxed this statutory protection for employers who have continuing contractual relations with the pressuring union. The 1959 Landrum-Griffin Act closed certain loopholes in the 1947 statute. It can hardly be suggested that in so doing, Congress meant to authorize any union conduct previously unlawful.[11] Rather "these 1959 amendments clearly reflect a Congressional attitude that unions should have no power over neutral employers to compel secondary action." *NLRB* v. *Local 769, Elec. Wkrs.*, 405 F.2d 159, 163 (9th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969).[12]

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[11] Congress added a proviso to § 8(b)(4)(B) to preserve the legality of the primary strike. See App. pp. 1a-2a. This proviso was added not to describe the outer limits of permissible activity, but "to make it clear that the [other] changes in § 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a preliminary labor dispute. It does not eliminate, restrict or modify the limitations on picketing at the site of a primary labor dispute that are in existing law." Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 Cornell L.Q. 724, 757 (1960), quoting H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959).

[12] The court below improperly interpreted *National Woodwork* as broadly authorizing unions to enlist employers with whom the union has a contractual relationship to secure union objectives. Indeed, the court created a *per se* rule of insulation when it stated (521 F.2d at 903): "We do not think that an employer who is struck by his own employees for the purpose of requiring him to do what he has lawfully contracted to do to benefit those employees can ever be considered a neutral bystander in a dispute not his own." As we have demonstrated above, *National Woodwork* expressly protected signatory employers where, the dispute and the strike are at least in part, if not solely, directed at the labor relations and business relationships of third parties.

The opinion below is premised upon what the court perceives (521 F.2d at 895) as Hudik's "blatant violation of (its employee's)

III. THE PROPRIETY OF THE CONTROL DOCTRINE AS AN EVIDENTIARY STANDARD UNDER § 8(b)(4)(B)

The control doctrine provides a comprehensive standard to determine the actual object of a union's boycott as well as a concrete basis for distinguishing intended from incidential effects within the Court's holding in *Local 761, Elec. Wkrs.* v. *NLRB, supra,* 366 U.S. at 673-74. This standard properly focuses upon the relationships between the owner of the construction project and the prime subcontractors engaged to perform work at the jobsite. Because of the integrated nature of the work at a construction jobsite, it is particularly important to determine the origin of the decision which resulted in the jobsite strike in order to separate the offending employer from others. This first step allows a rational determination to be made as to if any, which employer, within the range of options permitted under existing business relations, may be able to satisfy the union's demands.[13]

This standard also permits precise and predictable application of two other factors, implicitly recognized in *National Woodwork,* by which the object of the boy-

contractual rights." However, the court in a footnote (521 F.2d at 895 n.25) concedes that Hudik and the Union may not have intended their contract to apply to work over which Hudik "does not have legal control".

The court below also unduly circumscribes the concept of neutrality under § 8(b)(4)(B). Of course Hudik is not "wholly unconcerned" with the outcome of the union's jobsite strike to enforce work preservation. But denying Hudik protection from the pressuring union because of this interest, obscures the real focus of the union's dispute, and eliminates the distinction between offending and other employers drawn by Congress in this statutory provision and approved in *Denver Bldg & Constr. Trades Council, supra.*

[13] Control over the disputed work does not alone privilege coercive conduct to enforce work preservation agreements. See *infra,* pp. ——.

cotting union can be discerned. A strike for work preservation against an employer who cannot reassign the work does not benefit the bargaining unit when such a strike may cause the employer's replacement at the jobsite with the immediate attendant consequence of the loss of all work. Nor does such a strike confer an indirect benefit upon the bargaining unit because literal enforcement of a work preservation clause which allows no modification for technological advances gradually reduces and ultimately eliminates employment opportunities. The strike then cannot be said to be directed at the labor relations of the boycotted employer—his only response deprives the bargaining unit of all the fruits of his successful bid. Rather, the labor relations directly affected are those of the manufacturer whose production methods assign certain jobsite tasks and assign them to production employees. It is the labor relations of the manufacturer and his employers which are the object of the unions jobsite strike. The manufacturer must change his automated, operational structure or withdraw from the market. Either course results in a direct loss of job security for his employees, and profoundly alters the reasonable expectations these employees have for higher wages, benefits, and improved working conditions.

Focus upon the available options possessed by an employer to resolve a labor dispute is firmly supported by legislative history leading to the 1947 proscription against secondary boycotts, and by the leading Supreme Court case interpreting this statutory provision. In enacting the Taft-Hartley amendments to the Wagner Act, Congress banned boycotts where:

> the employers are powerless to comply with demands giving rise to the [boycotting] activities . . . . H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947).

In *NLRB* v. *Denver Bldg. & Constr. Trades Council, supra,* the Court reasoned the council's strike was an unlawful secondary boycott because the general contractor was powerless to dispose of the dispute without terminating an existing contractual relationship with a non-union subcontractor. 341 U.S. at 688. See also *Deanglo & Local 98,* 121 NLRB 676 (1958). The District of Columbia Circuit has previously recognized that § 8(b)(4)(B) shelters employers "who are powerless to resolve a dispute." *Local 5, Plumbers* v. *NLRB, supra,* 321 F.2d at 371.

The development and application of the control standard under § 8(b)(4) is an appropriate exercise of the Board's authority derived from Congress in §§ 1, 3 (a), and 10 of the Act to apply and interpret its administrative mandate in a manner which accurately reflects changing patterns in the construction and other industries and evolving relationships between contractors and suppliers. Compare *NLRB* v. *Denver Bldg. & Constr. Trades Council, supra,* 341 U.S. at 689-90 (prime and sub-contractors not in reality same employer).

Because the distinction between lawful and unlawful strike pressure can be less than obvious other evidentiary standards have also been developed as aids in determining the purpose of challenged union conduct under § 8(b)(4). Whenever an employer's premises or jobsite temporarily becomes the worksite of an employer involved in a labor dispute, there is a great likelihood picketing will cause a loss of business and enmesh other employers in a dispute not their own. Cox, "Strikes, Picketing and the Constitution", 4 Vand. L. Rev. 574, 594 (1951). To separate unlawful from lawful picketing, the *Moore Drydock* standards "determine the object of picketing where the other evidence is equivocal." *NLRB* v. *Northern California District Council,* 389 F.2d 721, 725 (9th Cir. 1968).[14] Violation of these standards is "presumptive of illegal activity." *Local 761, Eelce.Wkrs.* v. *NLRB, supra,* 366 U.S. at 677. These standards, like the control doctrine at issue, here, are not applied on an indiscriminate *per se* basis, but are merely aids in determining the underlying question of statutory violation. *Local 861, Elec. Wkrs,* 135 NLRB 250, 255 (1962).

Another labor law area also unchartered by legislative signposts is the question of successorship. After a change of ownership in the "employing industry," representative, remedial, and arbitration obligations depend upon whether the purchaser is a "successor". Management's prerogative to dispose of or purchase enterprises must be balanced with employees' interests in continuing representative rights. These interests are extinguished or recognized on the basis of the continuity of the workforce after the sale, i.e., whether a majority of the purchaser's employees formerly worked for the seller. See *NLRB* v. *Stepp's Friendly Ford,* 388 F.2d 833, 836 (9th Cir. 1964); cited with approval

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[14] *Sailors Union of the Pacific (Moore Drydock),* 92 NLRB 547 (1950) holds that common situs picketing which met the following conditions would be presumptively lawful:

> (a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer. 92 NLRB at 549.

in *Tallakson Ford, Inc.*, 171 NLRB 503, 504 (1968). The Court approved this standard in *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 263 (1974). See Note, "The Supreme Court, 1973 Term." 88 Harv. L. Rev. 43, 268 (1974).

The fashioning of these standards, as well as the control doctrine under consideration here, are particularly within administrative competence. Indeed the right of control doctrine at issue here is closely analogous to the control test applied to separate independent contractors from employees required by § 2(3) of the Act. This control test was approved in *NLRB* v. *United Ins. Co.*, 390 U.S. 254 (1968); see also *Restatement of the Law of Agency* (2d) § 220(1) and (2) (1957). Such formulas evolve from judgments based upon accumulating expertise rather than merely *ad hoc* factual determinations. J. Landis, *The Administrative Process*, 10-17 (1938). As Congress intended in delegating regulatory discretion, competing legitimate interests require careful and informed balancing.[15]

[15] Adoption of the control standard under § 8(b)(4) will not conflict with *NLRB* v. *Ins. Agents' Union*, 361 U.S. 477 (1960). Congress intended to prevent union abuse of economic power by proscribing all forms of coercion and restraint including picketing where an object falls within the ambit of this statutory provision. Unlike § 8(b)(3) of the Act involved in *Ins. Agents*, § 8(b)(4) "clearly poses the problem (of determining the union's object) to the Board for its solution." *NLRB* v. *Ins. Agents' Union*, *supra*, 361 U.S. at 498. When, as here, the exercise of economic weapons runs afoul of § 8(b)(4)(B), their proscription accords with specific Congressional intent. Section 13 of the Act specifically provides that the statutory right to strike is limited by the other provisions of the Act, such as §§ 8(b)(4) and 8(b)(7) of the Act.

IV. WORK PRESERVATION DOES NOT PERMIT UNIONS TO EXERT COERCIVE PRESSURES UPON EMPLOYERS WITH WHOM NO CURRENT COLLECTIVE BARGAINING RELATIONSHIP EXISTS

National Woodwork is premised upon an employer's contractual promise in the context of a continuing collective relationship with a union to assign work to bargaining unit employees represented by that union in a manner which comports with the union's interests. Necessarily outside the reach of this opinion are employers who have not made such a contractual promise. The Court below recognized this when it stated (521 F.2d 885, 897-98 n.29):

> When a union's sole objective is work preservation, it would be anomalous to allow it to press its demands on a general contractor with whom it has no on-going relationship.

Similarly, the Chamber submits, manufacturers and suppliers who have no contractual relationship with the pressuring union are also beyond the reach of direct pressure to force reassignment of jobsite tasks even though these employers might be able to satisfy the union's demand by modifying production systems. This limitation upon coercive union conduct to force changes in job assignments is entirely consistent with *National Woodwork*. There, the Court defined a permissible product boycott as one "addressed to the struck employer *vis-a-vis* his own employees" (386 U.S. at 645), and defined an unlawful boycott as one which "benefits . . . other than the boycotting employees or other employees of the (boycotted) employer". *Id.* The purpose of a boycott directed against a general contractor or a supplier is not to preserve work for the employees of the boycotted employer, but, instead, to

take certain work away from them. Thus, the boycott does not benefit the employees of the boycotted manufacturer, but benefits union members not in the plant but at the jobsite. Work preservation is thus not a purpose for which unions can directly pressure employers whose employees are unrepresented by the pressuring union.

A union may feel a need to protect jobsite tasks on behalf of all its members, but the protection of such board interests is limited by §§ 8(b)(4)(B) and 8(b)(7). The courts have recognized that union strikes to secure *future* work opportunities for union members or to protect the interests of union members *generally* are beyond the legitimate interests of bargaining unit employees and violate § 8(b)(4). *Local 216, Teamsters* v. *NLRB (Bigge Drayage Co.),* 520 F.2d 172, 179-80 (D.C. Cir. 1975); *NLRB* v. *New York Lithographers,* 385 F.2d 551, 555 n.10 (3d Cir. 1967); *Local 710, Meat and Highway Drivers* v. *NLRB,* 335 F.2d 709, 717 (D.C. Cir. 1964).[16] The principle that lawful boycotts cannot be extended beyond existing collective bargaining relationships has recently been reaffirmed in *Connell Co.* v. *Local 100, Plumbers,* 421 U.S. 616, 633 (1975) (strike pressure against non-signatory contractor to limit subcontracting to union represented firms is outside construction proviso § 8(e)).

National Woodwork is also directly premised upon the carefully limited precedents established in *Fibre-*

[16] These two authorities do not involve construction unions, but these labor organizations like industrial unions are fully covered by the secondary boycott provisions of the Act. *NLRB* v. *Denver Bldg. & Constr. Trades Council, supra; Markwell & Hartz, Inc.* v. *NLRB* 387 F.2d 79 (5th Cir. 1967), *cert. denied,* 391 U.S. 914 (1968).

board[17] and *Oliver*[18]. 386 U.S. at 642-43. *Fibreboard* restricted management's subcontracting prerogative because of the interests of the "existing bargaining unit". 379 U.S. at 207.[19] *Oliver* insulated a clause in a collective bargaining agreement from antitrust considerations because the clause directly related to wage rates of immediate concern "to the carriers' employed drivers." 358 U.S. at 294. And *Houston Insulation Contractors Ass'n* v. *NLRB,* 386 U.S. 664 (1967), is likewise founded upon the collective interests of existing bargaining unit employees. There jobsite employees refused to install prefabricated insulation which had not been manufactured by in-plant emplioyees. Both bargaining units were employed by the same employer, and the employer had agreed to a work-preservation agreement which limited insulation preparation to the in-plant bargaining unit. The Court viewed the jobsite work stoppage as concerted support by one group of employees for another. Since both groups of employees were employed by the struck employer and the employer could simply resolve the controversy by reassignment without terminating any business relationships, it could hardly be said the employer was involved in a "dispute not his own." 386 U.S. at 669.

The Ninth Circuit has ruled that § 8(b)(4)(B) proscribes threats of picketing directed to general contractors to compel observance of work preservation agreements. *Western Monolithics Concrete Prods. Inc.*

[17] *Fibreboard Paper Prods. Corp.* v. *NLRB,* 379 U.S. 203 (1964).

[18] *Local 24, Teamsters* v. *Oliver,* 358 U.S. 283 (1959).

[19] See also references to "established bargaining unit" (379 U.S. at 210), "work previously performed by employees in the bargaining unit" (379 U.S. at 210), "replacement of employees in the existing bargaining unit" (379 at 215).

v. *NLRB,* 446 F.2d 522 (9th Cir. 1971). Even though the general contractor in that case could conceivably have satisfied the union's demands by ordering other than prefabricated fireplaces, the absence of a collective bargaining agreement with the pressuring union, or any current employees represented by that union, placed the general contractor beyond any obligation to assign work to union members whom the contractor did not employ. The Fourth Circuit has also held that "work preservation" strikes are secondary if directed to any employers "not in (contractual) privity" with the striking union. *George Koch Sons, Inc.* v. *NLRB,* 490 F.2d 323, 327 (1973). *Accord*: *Carpenters, Local 112 (Summit Valley Inds. Inc.),* 217 NLRB No. 129 (1975), 89 LRRM 1799 (review petitions pending 9th Cir.) (Nos. 75-2064, 2166, 2770).

This limitation does not implicitly repeal § 13 of the Act or otherwise outlaw the free exercise or economic weapons. This restriction is not only fully consistent with the restrictions upon the exercise of economic weapons specifically enacted in § 8(b)(4), but also respects and implements the balance between labor and management struck by Congress in the 1947 Taft-Hartley Act. This statute was enacted to rebalance the exercise of economic weapons which enable unions to support and employers to resist collective bargaining demands. Senator Taft characterized this balance on the Senate floor before passage of the Taft Hartley Act:

> We have tried to correct secondary boycotts and jurisdictional strikes. The truth is that originally, before the passage of any of the laws dealing with labor, the employer had all the advantage. He had the employees at his mercy, and he could practically in most cases dictate the terms which he wished to impose. Congress passed the Clayton Act, the Norris-LaGuardia Act, and the Wagner Act. The latter act was interpreted by a completely prejudiced board in such a way that it went far beyond the original intention of Congress, until we reached a point where the balance had shifted over to the other side, where the labor leaders had every advantage in collective bargaining and were relieved from any liability in breaking the contract after they had made the bargain. That was a condition under which strikes actually were encouraged and protected, no matter what the purpose or the character of the particular strike.
>
> All we have tried to do is swing that balance back not too far, to a point where the parties can deal equally with each other and where they have approximately equal power. 93 Cong. Rec. 7690-91 (1947).

The Court has been faithful to this legislative intent [20] because as one noted commentator has stated: "(these) amendments represented an abandonment of the policy of affirmatively encouraging the spread of collective bargaining and the striking of a new balance between protection of the right to self-organization and various opposing claims" Cox, "Some Aspects of the Labor Management Relations Act, 1947", 61 Harv. L. Rev. 1, 2 (1947).

To permit unions to reach "stranger" employers who are under no obligation to the union, grants labor organizations broad economic leverage beyond current representational and contractual interests. Such pressure directly disrupts seemingly unrelated transactions

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[20] *E.g., Porter* v. *NLRB,* 397 U.S. 99, 109 (1970); *American Ship Bldg. Co.* v. *NLRB,* 380 U.S. 300, 316 (1965); see also *Local 60, Bookbinders* v. *NLRB,* 486 F.2d 837 (8th Cir. 1973), *cert. denied,* 416 U.S. 938 (1947).

which evolve out of increasingly close economic interrelationships. These residual impacts tip the balance of economic power in favor of unions by closing markets to employers and limiting their growth possibilities, thereby distorting existing bargaining relations, and canceling the option granted unorganized employers to resist collective bargaining demands advanced by their own employees. Denial of this ability frustrates national labor policy.[21]

[21] This restriction upon picketing at the jobsite and at the premises of third parties to enforce work preservation agreements does not abridge the constitutional guarantee of free speech. Congress, like individual states, may ban picketing which furthers the attainment of unlawful objectives. *Local 695, Teamsters* v. *Vogt*, 354 U.S. 284, 294 (1957). Congress declared the boycott to be an evil because of its serious, disruptive impact upon interstate commerce, and charged the Board in § 8(b)(4)(B) to eliminate all coercive conduct to achieve this end. Whenever peaceful picketing is carried on for such a purpose, it may be properly restricted without infringing upon First Amendment guarantees. *Local 501, Elec. Wkrs.* v. *NLRB*, 341 U.S. 694, 705 (1954). Picketing is not just speech but conduct. *Hughes* v. *Superior Court*, 339 U S. 460, 464 (1949). In recognition of this distinction, Congress in the proviso to § 8(b)(4) separated picketing from other permissible forms of publicity like handbilling Public opinion may thus be enlisted in support of work preservation goals. Unions may peacefully picket non-signatory employers within their jurisdictions to compel recognition subject only to the limitations set forth in § 8(b)(7). See Note, "Illegal Picketing under § 8(b)(7)-A Reexamination", 68 Colum. L. Rev. 745 (1968). Once lawful recognition is achieved, unions may secure direct employer assent to work preservation objectives. These alternatives in labor's arsenal readily secure work preservation interests, and there is no warrant for augmenting them by authorizing the Union's boycott here or by permitting the Union to directly picket non-signatory parties.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Court issue an order directing the Court of Appeals to enforce the Board's order in full.

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May 1976

APPENDIX

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • •
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employes under the provisions of section 9: • • •
>
> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by

another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods or not to perform any services, at the establishment of the employer engaged in such distribution;

Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES

(Continued on inside of cover)

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To The Honorable Chief Justice and Justices Of The Supreme Court of the United States:

Pursuant to Rule 42(3) of the Rules of this Court, Associated General Contractors of America, Inc. (AGC) and the National Association of Home Builders of the United States (NAHB) hereby respectfully move for leave to file a brief *amicus curiae* in this case in support of the Petitioner, National Labor Relations Board. The consent of the Solicitor General has been obtained and has been filed with this Court. The consent of the attorneys for Respondent was requested on April 28, 1976, but no response has been received. A copy of such request has also been filed with this Court.

AGC is a national trade association representing 8,116 general contractors in the construction industry. NAHB is comprised of over 75,000 employers in the home building industry. As representatives for these employers, AGC and NAHB have a direct interest in the judicial resolution of federal labor law issues, particularly those decisions involving labor-management relations in the construction industry.

The issues raised by the instant case are of critical significance to those companies represented by AGC and NAHB in their working relationships with other enterprises involved in construction (owners, suppliers, subcontractors) and the labor organizations representing their employees. Moreover, the questions before this Court will necessarily involve consideration of the effect of certain labor organization practices to restrict the right of contractors to utilize new technology, increase productivity and adopt more efficient methods of construction. Petitioner will no doubt concentrate on the primary and secondary aspects of Respondent's conduct in the facts of this case. AGC and NAHB participation will focus on the adverse consequences to the construction industry and the nation resulting from

such conduct. Thus, AGC and NAHB respectfully submit that their contribution will assist the Court in recognizing the legal and economic significance of the case at bar.

WHEREFORE, Associated General Contractors of America, Inc. and the National Association of Home Builders of the United States respectfully move this Court for leave to file their joint brief as amici curiae in support of the position of the Petitioner, National Labor Relations Board.

Respectfully submitted,

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BRIEF OF AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES

INTEREST OF THE AMICI CURIAE

1. The Associated General Contractors of America, Inc. (AGC) is a national trade association consisting of 114 state and local chapters, including Puerto Rico, and represents 8,116 general contractors engaged in the construction industry. Construction is the largest industry in the United States, with a seasonally adjusted volume of 134 billion dollars for 1976. The members of AGC perform approximately 60% of the general contracting business throughout the United States.

2. The National Association of Home Builders of the United States (NAHB) represents 75,000 members of the home building industry in 614 state and local associations located throughout the United States and Puerto Rico. New private residential construction is projected to total over 63.5 billion dollars during 1976, 3.8% of the Gross National Product.

3. The members of AGC and NAHB are direct producers of gainful employment for numerous individuals, many of whom are represented by the building and construction trade unions. Both AGC and NAHB have a vital concern with any judicial interpretation which directly affects construction industry labor-management relations.

4. The importance that this case bears especially to the home building industry and to the American home buyer should not be underestimated. The NAHB's Research Foundation in its 1974 report on "builder practices," a national survey of 1600 builders on the characteristics and construction practices for all types of one-family homes, points to the fact that there is an increase within residential building of fabricated and pre-assembled building components with a resulting

increase in on-site construction productivity and lowering of home construction costs.

5. The issues presented in the instant case are of particular importance to AGC and NAHB. The contractor-members of AGC must necessarily rely upon subcontractors and the suppliers of construction materials and components if major construction projects are to be completed in an efficient and economical manner. Similarly, to obtain its goal of producing a decent living environment for all American families at the most reasonable cost possible, the members of NAHB must utilize advanced construction technology, including more efficient and productive work processes and improved building products, materials and components. The opinion of the Court below, if sustained, would directly inhibit the construction industry's ability to meet those objectives.

ARGUMENT

I.

THE LEGAL LIMITATIONS OF THE SECTION 8(e) CONSTRUCTION INDUSTRY PROVISO WERE EXCEEDED BY THE "WORK PRESERVATION" CLAUSE HELD LAWFUL BELOW

Within the last year, this Court stated in *Connell*[1] that "Congress limited the construction industry proviso

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[1] *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO*, 421 U.S. 616 (1975).

to . . . [a] single situation, allowing subcontracting agreements only in relation to work done on a jobsite."[2] *Id.* at 630. The clear meaning of this language is that work preservation agreements between an employer and a union operate as an illegal product boycott when the union, as the result of that agreement, seeks to acquire work not designed to be done at the jobsite. The legislative history of this proviso to Section 8(e) supports fully this limitation.

The original Senate proposal for Section 8(e) would have outlawed hot cargo agreements only between labor organizations and common carriers.[3] However, the House version, the Landrum-Griffin Bill, prohibited such agreements with any employer.[4] A compromise on the two versions was reached during the Conference Committee's consideration of the two proposals.

[2]The construction industry proviso is the first proviso contained in Section 8(e), 29 U.S.C. § 158(e). Section 8(e) states as follows:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work *to be done at the site of the construction*, alteration, painting, or repair of a building, structure, or other work. . . . [emphasis added]

[3]S. 1555, 86th Cong., 1st Sess. § 707 (1959).

[4]H.R. 8400, 86th Cong., 1st Sess. § 705 (1959).

Senator Kennedy, describing the Conference Committee changes, stated that "the Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to *work to be done at the site* of the construction project."[5] (Emphasis added) Senator Kennedy also stated that:

> It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.[6]

Similarly, in the Statement Of The Managers On The Part Of The House, it was reported that:

> [i]t should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction.[7]

The above-cited legislative history of the proviso represents the clear expression of Congress' intent as to its scope. While many legislators expressed opposing views on this subject after the enactment of the proviso,[8] Justice Brennan, speaking for the majority in

[5]Report of Conference Committee on S. 1555, 86th Cong., 1st Sess. §16413 (1959), reprinted in *II NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, at 1432 (1959) (hereinafter cited as *1959 Legis. Hist.)*

[6]II *1959 Legis. Hist.* at 1433. *See also id.* at 1721 (remarks of Representative Thompson).

[7]I *1959 Legis. Hist.* at 943.

[8]*See, eg.*, II *1959 Legis. Hist.* at 1815 (Remarks of Senator McNamara).

National Woodwork Manufacturers Association v. National Labor Relations Board, 386 U.S. 612 (1967), properly noted that "these statements could represent only the personal views of these legislators, since the statements were inserted in the Congressional Record after the passage of the Act."[9]

The legislative history recited above comports also with this Court's recent discussion in *Connell* of the scope of the construction industry proviso.[10] Applying this Court-approved view of the scope of the proviso to the instant case,[11] it is clear that Respondent's concerted activities were in support of an attempt to enforce its "work preservation" clause impermissably beyond the protection of the proviso. The work being sought by Respondent was never intended "to be done at the site of the construction."[12]

In addition, any reliance on *National Woodwork* to support the "work preservation" clause herein is misplaced. In *National Woodwork* the dispute involved the general contractor and work which was not required by business contract or design specifications to be done off-site.[13] In protesting the general contractor's decision

[9]386 U.S. at 639 n. 34.

[10]421 U.S. at 628-632.

[11]*Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO v. National Labor Relations Board*, 521 F.2d 885 (D.C. Cir. 1975).

[12]29 U.S.C. § 158(e).

[13]386 U.S. at 616.

to purchase premachined doors instead of "blanks" for job-site machining, the union was attempting to preserve work open to its members when the contractor reached a business agreement with the owner. In contrast, in the instant fact situation, the work protested by Respondent was, at all times, intended to be done off-site. Thus, Respondent's action becomes no more than a product boycott and clearly prohibited by Section 8(e).[14] Furthermore, as stated by Justice Stewart in his dissent in *National Woodwork*, reliance on the *Fibreboard* case[15] to support the type of "work preservation" attempted in *National Woodwork* or the instant one

> Is wholly misplaced . . . . An employer's decision as to products he wishes to buy presents entirely different issues [than his decision to contract out work, in the plant, *now* being done by his employees]. That decision has traditionally been regarded as one within management's discretion and Fibreboard does not indicate that it is a mandatory subject of collective bargaining, much less a permissible basis for a product boycott made illegal by federal labor law.

Id. at 386 U.S. at 662.

Thus, when this Court's decisions in *National Woodwork* and *Connell* are read together with the aforementioned legislative history of the construction industry proviso to Section 8(e), it must be concluded that if there is any vitality left to the proviso's protection of "work preservation" clauses, it cannot be extended to work to be done away from the job site

[14]*See* note 6 *supra*.

[15]*Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203 (1964).

pursuant to contractual arrangements between the prospective employers and owners prior to commencement of an employer's work at the site or as the result of the architect's design specifications for the project. To hold otherwise would be to permit product boycotts in direct contravention of the statutory language and the expressed legislative intent.

II.

THE "WORK PRESERVATION" CLAUSE HELD LAWFUL BELOW ILLEGALLY RESTRAINS COMMERCE IN VIOLATION OF THE ANTITRUST LAWS

The agreement approved by the majority below is not only in violation of Section 8(e) but it also contravenes the purpose and intent of the national policy in favor of competition embodied in the federal antitrust laws.[16] The Respondent has sought to acquire new work at the sacrifice of overall efficiency. This Court in *Connell* held that such a result was not consistent with the goals of national labor policy when it said:

> Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the anti-trust laws strive to protect.

[16]The Court has emphasized that the antitrust laws constitute a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). The Court's view as to the purpose of the Sherman Act, 15 U.S.C. § 1 *et seq.*, was succinctly stated in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958): "the policy unequivocally laid down by the Act is competition." *Id.* at 4-5.

Id. at 623.

There has been increasing concern regarding the impact of private contractual[17] restrictions on economic efficiency, including their impact on the use of the most efficient available technology in the construction industry. It is clear that the "work preservation" clause at issue here does constitute a direct restraint on the business market.[18] To validate the threat or enforcement of a boycott by employees or unions representing them, under a "work preservation" clause of the type at issue here, would operate to deter subcontractors from bidding on projects with specifications which include pre-fabricated components, and thus discourage the use of pre-fabricated goods. This was recognized by the Administrative Law Judge[19] and accepted by the Board. As significant cost savings may be expected with the

[17]*See* BNA Antitrust & Trade Regulation Report No. 758 at A-8 (April 6, 1976), noting the concern of the Federal Trade Commission's Office of Policy Planning and Evaluation regarding this area.

[18]*See Enterprise Association*, 521 F.2d at 896 n. 25, where the majority approvingly quotes the statement of the Administrative Law Judge that: "If prepaid [sic] units cannot be installed . . . Austin and other contractors will not specify their purchase and use in buildings." This effect is explicitly recognized by both the concurrence, 521 F.2d at 905 (Bazelon, J., concurring), and the dissent, 521 F.2d at 929 (MacKinnon, J., dissenting). Justice Stewart has previously noted that the "restraint on the free flow of goods in commerce" resulting from work preservation product boycotts "is direct and pervasive." *National Woodwork*, 386 U.S. at 656 (Stewart, J., dissenting).

[19]*See Enterprise Association*, 521 F.2d at 930 n. 56 (MacKinnon, J., dissenting).

wider use of pre-fabricated components in construction,[20] the effect of allowing private contractual arrangements to prevent the use of such components is to artificially increase the cost of finished construction to consumers. Moreover, the result is to prevent the access of Slant/Fin's products to all union construction projects. *See Allen-Bradley Co. v. IBEW, Local 3*, 325 U.S. 797 (1945).

In addition to forcing artificially high prices to be charged for finished construction by foreclosing the use of pre-fabricated components, with their attendant economies of scale, such private contractual arrangements also serve to stifle innovation in construction methodology. In a detailed study on the economics of the construction industry, one economist observed that:

> The major factors affecting the efficiency of organization in construction are shown to be of institutional nature. Consequently, the industry's performance is adversely affected by [among other factors] the prevalence of building code and labor union restrictions on innovations.[21]

Other commentators as well have noted the adverse impact "work preservation" claims have upon the nation's housing market and upon technological innovations in production methods. *See, e.g.*, Brinker & Taylor, *The Secondary Boycott Maze*, 25 Lab. L.J. 418, 427 (1974).

The majority below contends that to focus upon the effects on the general contractor is "to ignore the

[20]P. Cassimatis, *Economics of the Construction Industry* 110 (1969).

[21]*Id.* at 126.

realities of this labor conflict". Instead, the majority below characterizes the harm in the instant case as a "blatant violation of [the subcontractor's employees'] contractual rights". 521 F.2d at 895. Whatever rights or liabilities may flow from such a private contractual restriction, it is clear that the existence of such a combination between a union and a non-labor group cannot serve to insulate the agreement from the impact of the antitrust laws when substantial anticompetitive effects are the result. A focus on the competitive effects on the business market – as is mandated by *Connell*, 421 U.S. at 625 – indicates that the "realities" of such an agreement are to preclude or hinder modernization, innovation, and the use of more efficient construction techniques, with the ultimate effect of increasing the price of finished construction for all consumers. These realities are clearly recognized by the dissent, which explicitly observes that such an agreement would "discourage the use of prefabricated goods," 521 F.2d at 929 (MacKinnon, J., dissenting), with the ultimate effect of "increas[ing] the costs of construction projects suited to pre-prepared components." *Id.* at 941 (MacKinnon, J., dissenting).[22]

The suggestion by the majority below that the subcontractor with whom the agreement was made, Hudik-Ross, might have attempted to "negotiate a compromise with the union under which the union would have agreed to install the climate control units in exchange for extra pay or other special benefits," 521

[22]It should be noted that "prefabrication appears to be particularly suitable in house construction," the area of most serious and immediate impact upon consumers. P. Cassimatis, *supra* note 20 at 111.

F.2d at 899, illustrates the majority's misconception of the anticompetitive effects of the agreement. Whatever the impact of such an arrangement for compensatory payments to the union on breach of contract questions, the impact on competition would remain the same – higher prices than necessary to consumers for finished construction, as the cost-savings from more efficient construction methodology and economies of scale would still not be passed on to consumers.[23]

This Court has mandated in *Connell* that the actual and potential anticompetitive effects of direct restraints on the business market resulting from agreements between union and non-labor parties must be closely scrutinized as to whether the practice is exempt from the Sherman Act's prohibition of restraints of trade. *Connell* was the first decision to clearly distinguish the "statutory" exemption from the operation of the antitrust laws conferred by Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and by the Norris-LaGuardia Act, 29 U.S.C. § § 104, 105, and 113, from a "nonstatutory" exemption said to be derived from a proper judicial accommodation of labor and antitrust policies. *See* 421 U.S. at 621-22, clarifying the discussions of such an exemption in *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965).

[23]Similarly, the majority's suggestion that the subcontractor simply not bid at all on projects calling for the use of prefabricated components, *Enterprise Association*, 521 F.2d at 895, would result in the freezing of industry work arrangements to those currently practiced, to the detriment of all owners and occupiers of finished construction. *See also id.* at 928 (MacKinnon, J., dissenting).

As regards the nonstatutory exemption, a balancing test is clearly contemplated. Unlike previous cases, which had concentrated on the intent of the parties, *Connell* looked to the *competitive effects* of the arrangement and not to the motivation for it.[24] The anticompetitive effects of the agreement proscribed in *Connell* are similar to those which flow from the practice upheld by the majority below. In *Connell*, this Court found that the agreement did far more than eliminate competition over wages and working conditions; its effect would be to foreclose from the market all non-union contractors, including more efficient ones, whether or not they met union standards for wages and working conditions. *Connell*, 421 U.S. at 623. *See The Supreme Court – 1974 Term*, 89 Harv. L. Rev. 47, 236-37 (1975). The practice upheld by the majority below would similarly produce serious anti-competitive effects, restricting the use of the most efficient available technology and leading to the foreclosure of prefabricated components from the

[24]The essence of the Court's analysis appears to be contained in the following passage:

> This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. . . . But the methods the union chose are not immune from antitrust sanctions simply because the goal is legal. . . . This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Id. at 625.

construction market. *Enterprise Association*, 521 F.2d at 929 (MacKinnon, J., dissenting). In effect, the planner of a construction project would find his freedom to contract for construction employers, materials, and components severely curtailed.

A reversal of the decision below would not only harmonize antitrust policy and labor policy in consonance with the dictates of *Connell*,[25] but would also comport with the recent series of decisions by this Court which have re-emphasized the importance of antitrust policy in a wide-range of regulated industries.[26] Moreover, a failure to invoke the protections and sanctions of the antitrust laws in the case at bar will result in the continued application of outmoded technology and the imposition of the *status quo* on construction techniques and materials, with a concomitant adverse effect on the nation's economy.

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[25]It should be pointed out that the majority below ignores the impact of antitrust policy generally and *Connell* in particular. *Connell* is cited only once in the course of an exhaustive majority opinion. *See Enterprise Association*, 521 F.2d at 898 n. 29. *Cf. National Woodwork*, 386 U.S. at 655-58 (Stewart, J., dissenting).

[26]*See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747 (1973). *See generally* Robinson, *Antitrust Developments: 1973*, 74 Colum. L. Rev. 163, 163-79 (1974). In addition, commentators have forcefully argued that, as a result of social and legislative changes since the passage of the Clayton Act and the Norris LaGuardia Act, there is a strong case for the application of the antitrust laws to certain union activities. *See* Siegel, Connolly & Walker, *The Antitrust Exemption for Labor – Magna Carta or Carte Blanche?*, 13 Duquesne L. Rev. 411, 466-80 (1975).

CONCLUSION

For all of the foregoing reasons, the Court is urged to reverse the decision of the Court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPE-FITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

CORRECTED COPY

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE PUBLIC SERVICE ELECTRIC AND GAS COMPANY, AMERICAN CYANAMID COMPANY AND EDISON ELECTRIC INSTITUTE

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IN THE

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OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,

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v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPE-FITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON BEHALF OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY, AMERICAN CYANAMID COMPANY AND EDISON ELECTRIC INSTITUTE

To The Honorable Chief Justice and Justices of The Supreme Court of the United States:

The motion of Public Service Electric and Gas Company, American Cyanamid Company and the Edison Electric Institute respectfully shows to the Court:

1. Public Service Electric and Gas Company (hereinafter Public Service) is a New Jersey corporation and the eighth largest public utility in the United States. American Cyanamid Company (hereinafter American Cyanamid) is a New York based corporation engaged in the manufacture of chemicals and allied products with plants throughout the United States. The Edison Electric Institute is the principal national association of investor-owned electric light and power companies in the United States. Public Service and American Cyanamid have participated in this case as amici before the United States Court of Appeals for the District of Columbia Circuit. In that court, those movants filed an extensive brief in support of the position of the National Labor Relations Board (hereinafter the Board). In addition, Public Service and American Cyanamid were permitted by the Court to file a brief in this matter in support of the Board's Petition for Certiorari.

Movants Public Service and American Cyanamid have also participated as amici before the Board in its consideration of similar issues in *Local 438 Plumbers & Pipefitters (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), and *Local 742 Carpenters (J.L. Simmons Company)*, 178 NLRB 351 (1969), enforcement denied and remanded, 444 F.2d 895 (D.C. Cir. 1971); supp. dec. —— F.2d ——, 91 LRRM 2595 (D.C. Cir. 1976). In addition, they filed an amici brief and participated in oral argument in the Fourth Circuit's consideration of *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973). Respondent has declined its consent to the filing of this biref. Accordingly, movants proceed under Rule 42(2).

2. The question before the Court is of vital concern to movants and to the individuals and industries they service. The facilities of Public Service constitute a vital link in the interconnected power system known as the Pennsylvania-New Jersey-Maryland connection (PJM). In order

to sustain its position in that system, Public Service, which provides service to approximately six million people, is continuously engaged in a program of construction and maintenance. Its construction program is an ongoing endeavor which will involve the expenditure of billions of dollars. For example, it is presently engaged in the construction of two multi-million dollar nuclear generating stations within the State of New Jersey and is in an advanced planning stage for a third facility utilizing nuclear power. The member companies of the Edison Electric Institute provide service to 99% of all customers served by investor-owned electric utilities and 77.5% of the nation's electricity users. Investor-owned electric light and power companies have budgeted $18 billion for construction in 1976. Last year (1975) such companies spent $15.1 billion for construction. Thus, together, they probably constitute the greatest single private purchaser of construction in the nation. Similarly American Cyanamid is continually engaged in construction projects at its plants throughout the United States and expends large sums in such projects.

3. The essential issue raised by this case is whether a union violates the secondary boycott provisions of the National Labor Relations Act when it induces its members to refuse to handle prefabricated goods that their employer's union contract obligates the employer to install or utilize. As Public Service, American Cyanamid and the member companies of the Edison Electric Institute rely upon union labor, the resolution of that issue will have a significant impact upon the labor costs which they incur and upon their decision to utilize such materials in the future.

4. Because Public Service and the members of the Edison Electric Institute are public utilities, their rates are subject to the closest possible public scrutiny and are inextricably intertwined with the public interest. Their obligation to avoid escalating construction costs, which

must ultimately be borne by the consumer, and to provide the best possible service at the lowest possible cost, is a public trust which they must fulfill. Similarly, American Cyanamid, in its obligation to its stockholders, employees and customers, is also concerned with both the cost of construction and the avoidance of labor disputes which inhibit and delay such projects.

5. Clearly, the Board's approach to this issue recognizes the construction industry's critical need for technological development which is dependent in such large measure upon prefabrication. Rejection of that approach would severely impede Public Service, the member companies of the Edison Electric Institute and American Cyanamid, as well as companies similarly situated, in their continuing struggle to keep pace with the needs of our society. Moreover, rejection of the Board's position will have an adverse radiating effect upon companies and their employees engaged in the manufacture of prefabricated materials. Accordingly, the participation of Public Service, American Cyanamid and the Edison Electric Institute will provide an extra dimension to the arguments presented by the Board and Respondent as they will present to the Court the views of the purchasers of construction whose interest will be vitally affected by the Court's decision.

WHEREFORE, Public Service Electric and Gas Company, American Cyanamid Company and Edison Electric Institute respectfully move this Court for leave to file their joint brief as amici curiae in support of the position of the National Labor Relations Board.

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IN THE

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Respondent.

BRIEF ON BEHALF OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY, AMERICAN CYANAMID COMPANY AND EDISON ELECTRIC INSTITUTE AS AMICI CURIAE

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Introduction

This brief on behalf of Public Service Electric and Gas Company, American Cyanamid Company and the Edison Electric Institute, as amici curiae, is filed pursuant to leave of Court granted upon motion made in accordance with Supreme Court Rule 42(2). It is in support of the Petitioner, the National Labor Relations Board.

Interest of Amici

Public Service Electric and Gas Company (hereinafter Public Service), the eighth largest public utility in the United States serving approximately six million consumers, together with American Cyanamid Company, (hereinafter American Cyanamid) a principal manufacturer of chemicals and allied products with plants throughout the United States, have participated in this proceeding as amici curiae before the United States Court of Appeals for the District of Columbia Circuit and have filed a brief in support of the Board's Petition For Certiorari. They have also participated as amici curiae in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973), a case in which the Fourth Circuit, contrary to the District of Columbia Circuit, approved the Board's "right-to-control" test in similar factual circumstances. The Edison Electric Institute (hereinafter the Institute) is the principal national association of investor-owned electric light and power companies in the United States and joins now with Public Service and American Cyanamid in this brief in support of the position of the National Labor Relations Board.

The question presented by this case is of vital concern to each of the moving companies, to the members of

the Institute and to the persons and industries they serve. Indeed, its impact is such that it may properly be regarded as one of the most significant issues which the Court has been petitioned to decide in the field of construction labor law in recent years.

The facilities of Public Service constitute a vital link in the interconnected power system known as the Pennsylvania-New Jersey-Maryland connection (PJM). In order to sustain its position in that system, Public Service has embarked upon a major and continuing program of construction and maintenance. Ultimately, this program will involve an expenditure of billions of dollars. For example, it is presently engaged in the construction of two multi-million dollar nuclear generating stations within the State of New Jersey and is in an advanced planning stage for a third such facility. Member companies of the Institute last year expended $15.1 billion for construction and have budgeted $18 billion in construction for 1976. Similarly, American Cyanamid is continually engaged in construction projects at its plants throughout the United States. In the performance of such construction, amici rely upon union labor.

The use of prefabricated materials in the making of repairs and in new construction is obviously of immediate and critical concern to amici as well as to other purchasers of union construction. Moreover, the right of such purchasers to elect to use prefabricated materials free from fear of labor retaliation warrants judicial protection.

Because Public Service and the member companies of the Institute are public utilities, their rates are subject to the closest possible public scrutiny and are inextricably intertwined with the public interest. Their obligation to avoid excessive construction costs, which must ultimately be borne by the consumer, and to provide the best possible

service at the lowest possible cost, is a public trust which they must fulfill. American Cyanamid, in its obligation to its stockholders, employees and customers, is similarly concerned with both the cost of construction and the avoidance of labor disputes which inhibit and delay such projects.

The Board's approach to the issue presented is consistent with established principles of labor law and contributes to an economic atmosphere in which technological progress may be achieved. Rejection of that approach would severely impede Public Service, the Institute and American Cyanamid as well as other purchasers of construction in their continuing struggle to keep pace with the needs of our society. Accordingly, amici strongly support the position of the National Labor Relations Board.

Summary of Argument

This case brings before the Court an issue over which the courts of appeals are in sharp conflict. The five to four decision below advances the view that the Board has applied its so-called "right-to-control" doctrine as a *per se* test of unlawful secondary conduct and that such doctrine misconstrues Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(B) as applied by this Court in *National Woodwork Manufacturers Ass'n.* v. *N.L.R.B.*, 386 U.S. 612 (1967). The opposing view, represented by the opinion of the four dissenters below, the decision of the Fourth Circuit in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973) and the decision of the Ninth Circuit in *Associated Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975), accepts the Board's right-to-control doctrine as a *prima facie* test of secondary objectives. Initially, therefore, this Court

must determine whether the Board has applied the right-to-control criteria to the exclusion of other factors or whether it has, as amici assert, adhered to the standard established by this Court in *National Woodwork* and examined "all of the surrounding circumstances".

Uniformly, the courts that have disapproved the Board's approach have based their disapproval upon *National Woodwork,* ignoring or misconceiving the fact that in *National Woodwork* this Court expressly declined to pass upon the issue now presented, namely, whether an employer who does not have the power to accede to a union's demand is a neutral entitled to the protections of the Act.

Prior to *National Woodwork,* the circuits which had considered the issue, including the District of Columbia Circuit, had approved the Board's examination of a contractor's right-to-control as a test of secondary objectives. Amici submit that the teachings of *National Woodwork* do not disturb the sound foundation in legislative history and judicial precedent upon which those decisions were founded.

In *Connell Construction Co.* v. *Plumbers Local 100,* 421 U.S. 616 (1975), this Court recently condemned as a violation of anti-trust law the efforts of a union to organize employees of a subcontractor by exerting economic pressure upon an employer with which it did not enjoy a collective bargaining relationship. The analogy to the Board's right-to-control doctrine is clear. Rejection of this doctrine will permit unlawful pressure to be asserted upon a party which, because it is unable to satisfy the union's demand, is clearly a neutral to the dispute entitled to remain free of coercive conduct.

The present conflict among the circuits leaves this critical area of construction labor law unsettled. Purchasers

of construction, such as amici, are confronted with the dilemma of either foregoing the advantages of technological progress if they desire to build with union labor or incurring the risk of labor difficulties with its concomitant delays and added costs. Amici, therefore, urge the Court to reverse the decision below and to reaffirm the sound principles of *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 (1951), and later decisions which have defined primary and secondary conduct and have assured to neutral parties the protection intended by Congress in its enactment of Section 8(b)(4)(B) of the National Labor Relations Act.

ARGUMENT

POINT I

The Board has not applied its right-to-control doctrine as a per se test of secondary activity.

From its initial paragraphs to its conclusion, the majority opinion below is critical of the Board's persistence in applying the right-to-control test despite the prior rejection of that doctrine by the District of Columbia Circuit and four other circuits.[1] Nevertheless, as pointed out by the dissent, the Board has never applied the right-to-control test with the exclusivity attributed by the Dis-

[1] *Local 742 Carpenters* v. *N.L.R.B.*, 444 F.2d 895 (D.C. Cir. 1971), cert. denied, 404 U.S. 986; *Local 636 Plumbers & Pipefitters* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir. 1970); *N.L.R.B.* v. *Local 164, I.B.E.W.*, 388 F.2d 105 (3rd Cir. 1968); *American Boiler Mfrs. Assn.* v. *N.L.R.B.*, 404 F.2d 556 (8th Cir. 1968); *Beacon Castle Square Building Corp.* v. *N.L.R.B.*, 406 F.2d 188 (1st Cir. 1969); *Western Monolithics Concrete Products, Inc.* v. *N.L.R.B.*, 446 F.2d 522 (9th Cir. 1971).

trict of Columbia Circuit and the other disapproving circuits. Thus, while conceding that lack of control is an important element to be considered by the Board in determining whether a union is engaged in permissible conduct in an effort to preserve its traditional on-site work or whether it is engaged in illegal secondary activity, the court below dismisses each effort by the Board to demonstrate that its determination is based on a total factual analysis. For example, the Board's effort to reassure the disapproving circuits in *Local 438 Plumbers & Pipefitters*, 201 NLRB 59 (1973), enforced sub nom., *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973), that it does indeed consider all the surrounding circumstances and does not apply the right-to-control test to the exclusion of all other factors is rejected out of hand.[2] More recently, the District of Columbia Circuit rejected the thorough factual analysis of the Board in *Local 742 Carpenters* v. *N.L.R.B.*, 444 F.2d 895 (D.C. Cir. 1971), cert. denied, 404 U.S. 986 (1971), supplemental decision, —— F.2d ——, 91 LRRM 2595 (D.C. Cir. 1976), which the District of Columbia Circuit had remanded because of what it considered to be the Board's per se application of the right-to-control test. Similarly, in the instant case, the thorough factual analysis of the Administrative Law Judge, which was adopted by the Board, is ignored in the court's zeal to once again chastise the Board for what it perceives as a reluctance to accept the direction of the circuits which have rejected the right-to-control test.

One must wonder whether the Board could obtain the approbation of such courts by any analysis except one which completely ignored the issue of control. In short, does the court below reject the right-to-control test as a *per se* doctrine or does it condemn the Board for attaching any meaningful significance to the lack of control?

[2] 521 F.2d 885, 889 (D.C. Cir. 1975), n.4.

The Board's disavowal of a "per se" approach was examined and accepted by the Fourth Circuit in its review of *Koch*. There the Court said, ". . . the Board has not exalted right to control as *per se* the conclusive indicium of a secondary boycott. On the contrary, the Board obediently followed the Court's instruction, according weight to all existing and relevant circumstances".[3] Thus, in essence, the Board was applying the same rule of law it had applied prior to the decision of this Court in *National Woodwork Manufacturers Association* v. *N.L.R.B.*[4]

This case, consequently, does not come before the Court as one in which the Board insists upon application of the "right-to-control" test to the exclusion of all other factors.

In addition to Hudik's lack of control, the Board considered *inter alia* the following factors:

1. The disputed work was substantially more than just cutting and threading the pipe to connect the air conditioning units to the basic piping that ran throughout the building. It would have required Hudik's employees to connect two valves and a condenser. Thus, the union sought to perform final assembly work on internal parts of the air conditioning units.[5]

2. The union knew that Austin, as the general contractor, was the only party with the power to comply with its demand.

[3] 490 F.2d at 327.

[4] 386 U.S. 612 (1967) affirming in part and reversing in part 354 F.2d 594 (7th Cir. 1965).

[5] 521 F.2d at 916.

3. Warranties accompanying the air conditioning units required that all internal piping be completed by the manufacturer's employees.

4. Austin had contracted for the purchase of prepiped Slant/Fin units before it subcontracted the heating, ventilation and air conditioning work to Hudik.

5. By declining to bid on projects with prefabricated air conditioning units Hudik could neither preserve work for his employees nor continue to be a competitive subcontractor.

6. New York City was an area in which non-union steamfitters or mechanical contractors were virtually unavailable. Accordingly, by bringing pressure upon Hudik, a union subcontractor, the union could effectively pressure Austin and other engineers not to utilize such units. Indeed, it could ultimately influence the decision of the manufacturer to withdraw from its own employees the right to install such internal piping in units destined for New York City or other highly unionized areas.

7. The record was devoid of any evidence that Hudik contributed in any way to its inability to assign the disputed work to its own employees.

Thus, having examined all of the surrounding circumstances as required by this Court's decision in *National Woodwork*[6] the Board concluded that an object of the union's conduct was to bring pressure upon Austin and Slant/Fin by striking Hudik, a neutral to the dispute,

[6] *National Woodwork Mfgs. Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967).

which was without power to accede to the union's demands. Therefore, as pointed out by the dissenting members of the court below:

> "The Board does not employ a per se formulation, which might well violate the stricture of *National Woodwork* that the focus of the union's action must be determined from all the surrounding circumstances; instead, the Board relies on a *prima facie* standard. By this test, a union may not boycott an employer who lacks the right to control the assignment of disputed work, *provided* that the employer has not voluntarily relinquished that control." 521 F.2d at 931[7]

Simply stated, the Board has said that where, as in the instant case, the union's actions are motivated by work preservation aims and directed against an employer who, *through no fault of his own,* is incapable of acceding to the union's demands, it must be concluded, absent other controlling factors, that the union's actions were undertaken for their effect elsewhere. Consequently, the pressured employer must be secondary in the dispute. By that approach, the Board has fulfilled the Congressional mandate to preserve the right of labor organizations to bring pressure to bear upon an offending employer in a primary labor dispute and to shield unoffending employers and others from pressure in controversies not their own. *N.L.R.B.* v. *Denver Building and Construction Trades*

[7] See, for example, *Pipefitters Local No. 120, United Association,* 168 NLRB 991, 992 (1967); *Painters District Council No. 20,* 185 NLRB 930, 932 (1970) where the employers' loss of control over the disputed work was the result of their own efforts. Compare *Carpenters Local 112 (Summit Valley Industries),* 217 NLRB No. 129 (decided May 12, 1975; 89 LRRM 1799).

Council, 341 U.S. 675, 692 (1951). To require that the Board attach little, if any, significance to the ability of a contractor to comply with a union's demands as a test of secondary conduct would so obscure the distinction between primary and secondary activity as to virtually repeal Section 8(b)(4)(B) of the Act by judicial fiat.

In *N.L.R.B.* v. *Local 825 Operating Engineers,* 400 U.S. 297 (1971) Justice Marshall stated that there are two threads to Section 8(b)(4)(B) that require disputed conduct to be classified as either "primary" or "secondary". He then commented that "[T]he tapestry that has been woven in classifying such conduct is among the labor law's most intricate." 402 U.S. at 303, 304. It is indeed, and the task of classifying such conduct will become ever more difficult if the Board is required to abandon its application of the right-to-control doctrine.

In contrast to a manufacturing plant, labor relations in the construction industry are infinitely more complex. A manufacturer has the opportunity to deal with each and every union with which he has relations and can and does hire all employees on his direct payroll. His production is only indirectly affected by the labor relations of other companies and he is rarely retricted in his relations with his customers or suppliers.

The contractor, on the other hand, is caught in a maze of contractual relationships at a job site where hot cargo clauses, sub-contractor clauses, work preservation clauses and the like have been developed by astute building trade unions attempting to avoid secondary entanglements and to give their disputes the ostensible appearance of primary action. Thus, a craft union's efforts to radiate its control upward[8] or downward for work to be done at the

[8] *N.L.R.B.* v. *Local 164, IBEW,* 388 F.2d 105 (3rd Cir. 1968).

job site,[9] or laterally for supplies or equipment purchased off the job site but to be used at the job site,[10] are all designed to completely obliterate secondary boycotts. In many instances, these tactics, improper as they are, have erroneously been sanctioned. However, the principles of *Denver Building Trades,*[11] *Moore Drydock*[12] and *General Electric*[13] are still viable, and stand unaltered as this Court is again called upon to effectuate the congressional purpose of protecting neutral parties from disputes not of their own making and over which they have no control.[14]

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[9] *Construction Laborers* v. *N.L.R.B. (Colson & Stevens Construction Co.),* 323 F.2d 422 (9th Cir. 1963), modifying 137 NLRB 1650); *Connell Construction Co.* v. *Plumbers Local 100,* 421 U.S. 616 (1975).

[10] *National Woodwork Manufacturer's Association* v. *N.L.R.B.,* 386 U.S. 612 (1967).

[11] *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675 (1951).

[12] *Sailors Union of the Pacific,* 92 NLRB 547 (1950).

[13] *Local 761 International Union of Electric, Radio and Machine Workers, etc.* v. *N.L.R.B. (General Electric),* 366 U.S. 667 (1961).

[14] The majority below expresses the view that Hudik-Ross' refusal to bid on the Austin contract would serve work preservation goals by persuading Austin and other engineers and general contractors not to specify their purchase and use in buildings. 521 F.2d at 896 (n. 25). *Thus, the majority, contrary to its own decision in this matter, appears to recognize that Austin and not Hudik was the object of the union's action.* Moreover, as pointed out by the dissenting opinion of Judge MacKinnon "[U]nder *National Woodwork* it is not sufficient that the agreement have a primary focus, if its enforcement is attempted by secondary pressures." 521 F.2d at 920.

POINT II

The Board's right-to-control test is consistent with National Woodwork.

Prior to *National Woodwork,* the District of Columbia Circuit as well as the Second, Third, Sixth, Seventh and Eighth Circuits had expressed their approval of the Board's examination of the right-to-control as a test of secondary objectives.[15] What then is said in *National Woodwork* that would require a different result? Initially, it must be recalled that this Court expressly declined to pass upon the test, noting that it was not in issue in *National Woodwork* because the contractor (Frouge) *did* have the ability to grant the union's demand that the doors in question be installed and machined at the job site.

Surprisingly, the majority below finds in this specific reservation of the control question a warning by this Court that the opinion is not to be read as impliedly approving the Board's right-to-control doctrine.[16] In reality, however, it is the disapproving circuits which have

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[15] *Local 5, Plumbers* v. *N.L.R.B.,* 321 F.2d 366 (D.C. Cir. 1963), cert. denied, 375 U.S. 921 (1963); *Local No. 636, United Assn. of Journeymen* v. *N.L.R.B.,* 278 F.2d 858 (D.C. Cir. 1960); *N.L.R.B.* v. *Entereprise Ass'n et al,* 285 F.2d 642 (2nd Cir. 1960); *Ohio Valley Carpenters District Council* v. *N.L.R.B.,* 339 F.2d 142 (6th Cir. 1964); *N.L.R.B.* v. *I.L.A., Local 1694,* 331 F.2d 712 (3rd Cir. 1964); *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.,* 354 F.2d 594 (7th Cir. 1965), reversed on other grounds, 386 U.S. 612 (1967); *N.L.R.B.* v. *Local 157 Plumbers,* 369 F.2d 388 (7th Cir. 1966); *American Boiler Mfgrs. Ass'n* v. *N.L.R.B.,* 366 F.2d 815 (8th Cir. 1966).

[16] 521 F.2d at 893 n.14.

found in *National Woodwork* that which is not there, namely a rejection of the right-to-control doctrine. Proponents of the Board's approach simply state that the Board's application of the test is clearly compatible with principles established in *National Woodwork*. Indeed, if anything is to be inferred from the Court's express refusal to pass upon this issue in *National Woodwork,* it is that this Court perceived a critical factual distinction in situations where control was absent. Moreover, the conclusion certainly does not follow that by declining to consider the Board's "right-to-control" test this Court directly or by inference rejected that criteria.

In *Work Preservation and the Secondary Boycott—An Examination of the Decisional Law Since National Woodwork,*[17] the author commented on this misplaced reliance upon *National Woodwork*:

> "The doctrines of valid work preservation and right-of-control [sic] have always been felt to be mutually exclusive. Where the Board has found a valid work preservation objective, it has still considered the question of right-of-control; where it has found the unit employer to be without control, it has nevertheless found a violation (citation omitted). It is doubtful that *National Woodwork* changed this basic distinction. *National Woodwork* involved work preservation; the validity of the right-of-control doctrine was specifically not decided."

As the Board pointed out in *Koch,* with the subsequent approval of the Fourth Circuit, *National Woodwork* did not hold that where a work preservation object is estab-

[17] 21 Syracuse Law Review 907, 922 (1970).

lished a union's conduct in furtherance of that objective cannot violate Section 8(b)(4)(B). As the Board stated:

> "Rather, the whole thrust of the *National Woodwork* decision is that the pressure as directed to Frouge was primary only because (1) its object was work preservation and (2) Frouge was in a position, as the facts themselves demonstrated, to respond itself to the union's pressure and give the union's members the work that they had traditionally performed. Thus the union's pressure was not undertaken for its effect elsewhere. In a situation as here where the pressured employer cannot himself accede to the union's wishes the pressure is secondary because it is undertaken for its effect elsewhere. The fact that its object was work preservation standing alone is not sufficient to validate its action if, as we have found here, it is directed at a neutral." (Footnotes omitted)[18]

The Fourth Circuit in approving the Board's decision in *Koch* drew the following distinctions between the facts of that case (which are essentially the same as in the case now before the Court) and *National Woodwork*:

> "The incidents not paralleled in *National Woodwork* were these: no right-to-control was possessed by the employer; the unions were informed of the employer's lack of control; the employer-contractor agreement required the fabrication to be done at the latter contractor's location; and the contract between that contractor and the owner obligated that contractor to fabricate the pipe at its place of bus-

[18] 201 NLRB 59, 63 (1973) enforced sub nom *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1971).

iness. These circumstances are quite material in differencing the facts here from those of *National Woodwork.* The Court there did not have to ponder these added circumstances to the existence or absence of a secondary boycott. Thus it did not preordain decision here." 490 F.2d at 327

In *National Woodwork,* this Court said that the "touchstone" is whether the agreement or its maintenance is addressed to the labor relations of a contracting employer, vis-a-vis his own employees. We submit that the Board's approach to this problem is consistent with that criteria and its rejection is

When entering into a work preservation clause, an employer does not agree to cease doing business with a purchaser who mandates the utilization of prefabricated materials, rather he agrees that *he will not on his own initiative elect to use* prefabricated materials where not required by the specifications. To agree that he will not do business in circumstances where he does not have control and *cannot preserve* work for the unit simply obstructs his ability to carry on his business. Applying this Court's test then, a strike to enforce such an objective is not directed to the labor relations of the striking employees' own employer, but rather to those of either the general contractor, the architect, manufacturer or owner.

This point is even more clearly made when one considers that many specialty contractors in the construction industry have a relationship with only one union. Therefore, we might expect that such a contractor would agree with its union that all work conceivably within that craft's traditional work history should be done at the job site. Obviously, to the extent that he does so such a clause would guarantee *work not only for the union, but for the*

specialty contractor as well. Stated differently, both parties may try to "feather their nests" through the negotiation of a "work preservation clause". Thus, they leave the owner who desires to build with union labor to face the dilemma of doing it their way and absorbing unnecessary costs or resorting to non-union labor and accepting the problems that such a choice may engender. And, whether such a clause is obtained from a willing or unwilling contractor, it places an owner desiring to use union labor in a veritable stanglehold.

It is not the obligation of the Board in its consideration of secondary boycott cases to seek out the primary employer but rather *to protect the neutral. Local 1066 Longshoremen Association (Wiegand Terminals, Inc.)*[19] To do otherwise leads to the fallacy suggested by the Court below and of the Ninth Circuit in *Western Monolithics Concrete Products, Inc.* v. *N.L.R.B.,*[20] where that Court reached the anomalous decision that a contractor with the ability to grant the union's demands was secondary and a sub-contractor without that power was primary.

Why is it necessary in determining who is protected against a strike or picketing to select a party which the union may strike or picket? We submit it is not. Situations in which unions may not resort to the remedy of picketing or a strike are not uncommon, especially in the construction industry.

For example, under Section 8(f) of the Act, 29 U.S.C. 158(f), it is now lawful for a union and an employer to

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[19] 137 NLRB 45, 48 (1962).

[20] 446 F.2d 522 (9th Cir. 1971), reversing in part 180 NLRB 43 (1969).

enter into a collective bargaining agreement in the construction industry prior to the time the employer has any employees on its payroll. Recognizing, however, that if this right were unrestricted, job disputes, strikes, picketing and other forms of coercion might occur in its wake, Congress made clear that the use of force, coercion, strikes or picketing to compel such a prehire agreement would be unlawful.[21] In *Centlivre Village Apartments,* 148 NLRB 854 (1964) the Board, reversing its previous holding in *Colson & Stevens,* sanctioned picketing to obtain a so-called "hot cargo" agreement under Section 8(e) of the Act. Nevertheless, the Board further held that under Section 8(b)(4)(B), lawful hot cargo clauses may be *enforced only through law suits and not through economic action.*[22] Thus there are labor objectives permitted by the Act which cannot be obtained or enforced by strikes or picketing. This point was clearly articulated by Judge MacKinnon in his dissent below. He said:

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[21] *Construction Laborers Local 383* v. *N.L.R.B. (Colson & Stevens),* 323 F.2d 422, 425 (9th Cir. 1963) reversing 137 NLRB 1650 (1962); H.R. Rep. No. 1147 on S 1555 (Sept. 3, 1959).

[22] We submit that the reversal by the Board of its *Colson & Stevens* doctrine was in error and established a point of law which this Court has never approved and which has spawned much of the confusion that confronts us today in the law of secondary boycotts. In *Connell Construction Co., Inc.* v. *Plumbers Local 100,* 421 U.S. 616 (1975) n.14; 95 S.Ct. 1830, 1840 n.14 (1975), this Court noted the argument advanced that §8(b)(4)(B) forbids picketing to secure a "hot cargo" agreement in the construction industry. The Court said, however, that because the agreement in *Connell* was outside the §8(e) proviso, it was unnecessary to consider this contention. Hopefully, the Court will have occasion to address this issue as it cries out for definitive judicial determination.

"The majority skirts the effect of the inclusive language of section 8(b)(4)(B) by insisting that the provision cannot in all reason be construed to preclude enforcement of a valid collective bargaining agreement. But we have been cautioned not to expand the Union's right to strike beyond the limits prescribed by the Act. The principle that 'a violation of the secondary boycott provisions cannot be justified by a contractual arrangement between the union and the neutral employer' dates to the Supreme Court's 1958 *Sand Door* decision. *There the Court recognized that a union might be left with a valid contractual provision and with no means of enforcing it other than in a civil suit.* The majority position is largely premised on the legitimacy of the Union's work preservation goal, but this court has given unequivocal support to the almost tautological view that legitimate ends may not be pursued by unlawful means. Where the valid goal of compelling compliance with a contractual provision combines with the unlawful object of pressuring neutral or secondary employers to achieve that goal, the statute will not permit a union to engage in economic action." (footnotes omitted) 521 F.2d at 935-936. (Emphasis added)

Judge MacKinnon also pointed out that the legislative history of the Act fully supports the Board's right-to-control test. He noted:

> "In passing the original secondary boycott restriction, the House of Representatives forecast the use of a right-to-control test when it indicated that it intended to proscribe those boycotts where 'the employers are powerless to comply with the de-

> mands giving rise to the [boycotting] activities. . . .' H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), I 1947 Leg. Hist. 314." 521 F.2d at 926

Fidelity to the principles of *Denver Building Trades* requires that regardless of the union's ultimate objective, proscribed conduct nevertheless violates the secondary boycott provisions of the Act if *an* object of the union is to cause one employer to cease doing business with another or of seriously disrupting their relationship.[23] As this Court said in *N.L.R.B.* v. *Local 825 Operating Engineers,* 400 U.S. 297, 305 (1971), the "cease doing business" objective is present where the implication is present that although a union may prefer to obtain the disputed work, if not obtained, it will require a cessation or impairment of the business relationship.

[23] Indeed, Hudik-Ross would have even less control over the selection of air conditioning units by Austin than the general contractor could have conceivably exercised over his subcontractors in *Denver Building Trades.*

POINT III

National Woodwork did not render all product boycotts free from the proscriptions of Section 8(b)(4)(B).

In his dissenting opinion in *National Woodwork,* Justice Stewart very pointedly observed:

> "[I]t is misleading to state that the union in *Allen Bradley* used the product boycott as a 'sword'. The record in that case establishes that the boycott was undertaken for the defensive purpose of restoring job opportunities lost in the depression. Moreover, the Court is unable to cite anything in *Allen Bradley,* or in the Taft-Hartley Act and its legislative history, to support a distinction in the applicability of Section 8(b)(4) based on the origin of the job opportunities sought to be preserved by a product boycott. *The Court creates its sword and shield distinction out of thin air; nothing could more clearly indicate that the Court is simply substituting its own concepts of desirable labor policy for the scheme enacted by Congress.* (Emphasis added)." 386 U.S. at 657, 658

The majority opinion in *National Woodwork* does not say that all product boycotts are lawful but attempts to develop the "sword v. shield" distinction. The majority opinion clearly is critical of any union effort that seeks to reach out and monopolize job tasks for its members. It observes:

> "We therefore have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs

or acquire new job tasks where their own jobs are not threatened by the boycotted product." [24]

Certainly a product boycott in circumstances where a struck employer is unable to satisfy the union's thirst for unattainable work *is* an effort "to reach out to monopolize jobs". It is also an effort to undermine a collective bargaining unit elsewhere or to acquire the work of other employees. *Those employees and their employers possess rights which also deserve protection.* Broadly speaking, the monopolizing effort is a jurisdictional dispute of grand design and clearly a restraint on commerce.

Thus, this effort which is euphemistically referred to by respondent as a "work preservation dispute" *is really a make work or monopolize work claim.* What is sought is the use of unbridled pressure on anyone upon whom such pressure can be brought, regardless of his neutrality in the dispute or his inability to effect a change, in order to take work away from other employees and their employers elsewhere.

In *Connell Construction Co.* v. *Plumbers. Local 100,* 421 U.S. 616 (1975), this Court pointed out that one of the major aims of the 1959 amendments to the Act was to limit "top down" organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of its employees. 421 U.S. at 632. Similarly, rejection of the Board's "right-to-control" approach would permit unlawful pressure from the *bottom up* by placing pressure upon a party unable to satisfy the union demands, and a neutral to the dispute. As pointed out by the dissenting opinion in the instant case:

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[24] 386 U.S. 612, 630 (1967).

"[T]he Union's dispute cannot logically be solely with the subcontractor but must instead be also with the party who dictates that prefabricated products shall be employed: the owner, the designer, the general contractor." *Enterprise Association Local 638* v. *N.L.R.B.,* 521 F.2d 885, 932, 933 (D.C. Cir. 1975)

Such conduct traditionally has been construed as unlawful secondary activity regardless of whether the union may also have had a legitimate work preservation objective. *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675 (1951); *N.L.R.B.* v. *Local 825 Operating Engineers,* 400 U.S. 297, 305 (1971).

Product boycotts therefore are not sanctioned by *National Woodwork* when employed to obtain new work, to monopolize jobs, or where, as in the instant case, they are enforced by secondary conduct against an employer who is powerless to accommodate the union in the achievement of its ends. Just as Connell, a general contractor, could not legally control the labor relations of its subcontractors, so too in the instant case Hudik could not control the selection of materials by the project general contractor. Hudik's agreement with the union, therefore, must be viewed as one where it agreed that *it would not on its own initiative elect to use* prefabricated materials *where not required to do so* by the job specifications.

To give broader reach to the union's work preservation provision as does the majority opinion below, would not only permit an unlawful intrusion upon the right of Hudik to carry on its business with others, but would also permit the union by secondary activity to intrude upon the relationships of the general contractor with the purchaser of construction and the purchaser with the manufacturer.

It is well recognized that a union's conduct may have various objectives. *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675 (1951). If then, the Court finds that *an* object of the union's conduct was to force or require a cessation of business with Austin, the Board's finding of a violation must be sustained. Stated differently, it is that purpose, namely, to bring about a total or less than a total cessation of business, to destroy, disrupt or interrupt a business relationship whether as an immediate,[25] ultimate,[26] conditional[27] or alternative object,[28] express or inferred, that Congress condemned through the enactment of the Taft-Hartley Act. In light of this condemnation, and the fact that the enactment of Section 8(e) was not intended to vitiate the body of law built around *Denver Building Trades,* it is clear that the Board has properly exercised its judgment in this and similar cases. *N.L.R.B.* v. *Local 825 International Union of Operating Engineers, AFL-CIO,* 400 U.S. 297 (1971).

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[25] *Tennessee Coal and Iron Division of United States Steel,* 127 NLRB 823 (1960), enforced as modified, 294 F.2d 256 (D.C. Cir. 1961).

[26] *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675 (1951).

[27] *Texas Industries,* 112 NLRB 923, n. 2 (1955), enforced, 234 F.2d 296 (5th Cir. 1956).

[28] *Bangor Building Trades Council, AFL-CIO (Davidson Construction Co., Inc.),* 123 NLRB 484 (1959), enforced, 278 F.2d 287 (1st Cir. 1960).

POINT IV

Restriction of the Board's approach will have adverse economic consequences upon the construction industry.

There is further support for the Board's view if we look through the other end of the telescope. What are the ramifications for the purchaser of construction? We know of no rule of law which permits a union to restrict a purchaser from specifying the type of material that will be utilized in his product. For example, a union cannot bring economic pressure upon an employer to force him not to comply with engineering specifications for government contracts in the defense industry, i.e. navel vessels, planes, tanks. Why then should construction be different? Essentially, when a contractor agrees to a work preservation clause he is agreeing that *insofar as it is within his control* he will not use certain prefabricated materials. It is a strained contractual interpretation that would compel a contractor as his sole alternative to reject work if the owner is adamant in his insistence upon his specifications.

An analogous situation was present in *N.L.R.B.* v. *Local 825 Operating Engineers.*[29] There the general contractor, Burns & Roe, had subcontracted all of the construction work at a nuclear generating station project in New Jersey to three other companies. In the course of construction, one contractor, White, utilized an electric welding machine and assigned its operation to members of the Ironworkers Union. Local 825 objected to the assignment and when Burns & Roe refused to accede to the

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[29] 400 U.S. 297 (1971).

demand that it sign a contract with Local 825 which would be binding on all subcontractors, all operating engineers employed by the three subcontractors walked off the job. The Third Circuit held that the union was not seeking by its strike activity to cause a cessation of business between White and Burns & Roe but merely a disruption of operations sufficient to bring pressure upon White through Burns & Roe to accede to the union's demands. It said, therefore, that to violate Section 8(b)(4)(B) the union must seek a *total* cessation of business between the primary and the secondary parties.

This Court, however, refused to take such a "narrow view" of Section 8(b)(4)(B). It recalled the principles of *Denver Building Trades,* wherein it was held that a violation exists if proscribed conduct is *among* the union's objects, even though it is not its *sole* object. In ***Burns & Roe*** this Court said:

> "Certainly, the Union would have preferred to have the employers capitulate to its demands; it wanted to take the job of operating the welding machines away from the ironworkers. It was willing, however, to try to obtain this capitulation by forcing neutrals to compel White to meet Union demands. To hold that this flagrant secondary conduct with these most serious disruptive effects was not prohibited by Section 8(b)(4)(B) would be largely to ignore the original Congressional concern." 400 U.S. at 305

So it is in the situation now before the Court. Surely the union would prefer that Hudik be offered and accept the work under its conditions. The ultimate object must be that unless those conditions are met (by Austin succumbing to the pressure upon Hudik), Hudik will cease doing business with Austin.

The ramifications of the union's conduct are no better demonstrated than in their application to Public Service Electric and Gas Company and the member companies of the Edison Electric Institute. As public utilities engaged in construction programs costing billions of dollars, they rely upon union labor. American Cyanamid, like other major purchasers of construction does likewise. History has shown, however, that union labor is often not its own best friend. We submit that it plants the seed of its own destruction in a philosophy that seeks to hold back the tide of technological change and says, "You'll do it our way or not at all."

It has been said that due to current population expansion we must, between now and the year 2,000, build as much as we have built since the discovery of America. This being so, it is absolutely essential that we create and apply new techniques which together with skilled manpower will accomplish this enormous task economically and efficiently.

Does the organized branch of the construction industry have the needed manpower and skills to accomplish the tasks required by modern design and methods in all phases of construction? Do the building trades have sufficient skilled men available? Until the recent recession, in the Northeastern United States, for example, some critical skills required at the work site could not be provided in sufficient quantity and quality to meet construction schedule requirements. High pressure and high temperature pipefitter crafts have not provided sufficient numbers of journeymen with welding qualifications to meet code certification requirements for many types of alloys and spe-

cialized sizes. Requisitions for persons with these special qualifications lay unfilled in union hiring halls. Prefabricated equipment built on factory jigs and fixtures using automatic or semi-automatic equipment could help to overcome these critical skill shortages unless their use is precluded by judicial decisions such as that below which stifles progress and permits building trade unions to reach out for what is not rightfully theirs.

With the energy crises facing our nation, power companies and other companies involved in meeting the needs of the public should not be engulfed in squabbles between contractors and unions over how a particular job must be done, when, in fact, the overriding concern should be that the job must be done. Moreover, the disputes of these competing parties should not be allowed to effectively interfere with the long-range planning and execution of responsibilities of these publicly regulated companies that have a far different standard and concern for the public welfare. Indeed, this concerned interest mirrors the sound restrictions of our law prohibiting interference with the free flow of commerce and unlawful restraints of trade.

Again, drawing upon the dissent below, we see the parallel between the facts of this case and *Allen Bradley Co.* v. *Local 3, I.B.E.W.*, 325 U.S. 797 (1945). Justice MacKinnon states:

> "Prior to passage of section 8(b)(4)(A) the boycott imposed by Local No. 3 was successful in requiring that electrical fixtures or installations manufactured elsewhere be 'dismantled and the wire taken out of them, and then' rewired on the job by the local union before they could be installed in New York City.
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> . . .
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> The result in the case of Local No. 3 would be the delivery to the installers of incomplete fixtures without internal wiring (or dismantling and rewiring) and with Local No. 638 (the Steamfitters) it would be the delivery of incomplete air conditioning units without internal piping (or dismantling and repiping)." (footnotes omitted). 521 F.2d at 924, 925

Although not yet actually in use, one technique for compressing the time required to build generating facilities is to purchase completely prefabricated generating stations, barge mounted, and to float them into position substantially ready for service. Public Service Electric and Gas has on order floating nuclear generating stations which will be manufactured by Offshore Power Systems, a joint venture of Tenneco and Westinghouse. Of even greater significance in the more distant future is the program of standardization of nuclear units proposed to nuclear steam supply system manufacturers by the Nuclear Regulatory Commission. Both approaches will enable public utilities to obtain increases in generating capacity within a more reasonable time span of five or six years. Both approaches will require extensive prefabrication. Should public utilities be frustrated or effectively prevented from exercising freedom of choice—their right-to-control if you will—because of restrictive work preservation clauses in union contracts? Is this in the public interest and can the secondary boycott strictures of the Act be so perverted as to enhance this possibility? We think not. Patently, the factors to be considered in this setting far transcend the usual bickering between an employer and its union.

We submit, therefore, that considering all of these circumstances, it makes little sense to allow unions and/or employers to engage in economic warfare in this context

at the expense of the community. No matter how a union may try to euphemistically phrase its position, what in fact is afoot here is an effort by construction unions to put pressure on whomever they can in order to force a method of construction that is not desired by the purchaser. This does not promote the interest of the consumer and we submit does not promote that balance and harmony in industrial relations which the Act seeks to achieve through the laudable pursuits of free collective bargaining.

CONCLUSION

For all of the foregoing reasons, the Court is urged to reverse the decision of the court below as prayed for in the petition of the National Labor Relations Board.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
APR 30 1976
MICHAEL RODAK, JR., CLERK

No. 75-777

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE* AND BRIEF OF AIR-CONDITIONING AND REFRIGERATION INSTITUTE, ASSOCIATED BUILDERS AND CONTRACTORS, INC., AMERICAN BOILER MANUFACTURERS ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, THE AMERICAN INSTITUTE OF ARCHITECTS, AIR MOVING AND CONDITIONING ASSOCIATION, INC., ARCHITECTURAL WOODWORK INSTITUTE, MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, INC., NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION AS *AMICI CURIAE*

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Supreme Court of the United States

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ENTERPRISE ASSOCIATION, LOCAL 638
OF THE UNITED ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Air-Conditioning and Refrigeration Institute, Associated Builders and Contractors, Inc., American Boiler Manufacturers Association, American Consulting Engineers Council, The American Institute of Architects, Air Moving and Conditioning Associa-

tion, Inc., Architectural Woodwork Institute, Mechanical Contractors Association of America, Inc., National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the petitioner, National Labor Relations Board, on the merits of the above-captioned case. In support of this motion the above-named associations show as follows:

1. This motion for leave to file is necessary under Rule 42(3) because counsel for the Respondent Union has advised the undersigned that the Union will not consent to the filing of any *amicus curiae* briefs in this case.

2. This Court previously granted the motion of the above-named associations for leave to submit a brief in support of the petition for writ of certiorari in this case. That motion was granted on February 23, 1976, the same day that the petition was granted.

3. The interest of the above-named associations in the issues presented in this case was set forth at length in our previous motion, referred to in paragraph 2 above, and is fully detailed in the accompanying brief at pp. 2-11. Briefly, these associations have long maintained an active interest in the status of the Naional Labor Relations Board's "right to control" doctrine, the validity and proper application of which are at issue in this case.

4. Application of the "right to control" test has a substantial impact on the ability of building trades unions to effectuate product boycotts on construction

projects. Such boycotts are a major weapon used by the unions to exclude prefabricated and factory-assembled products and materials from construction sites and force resort to less efficient, and frequently less satisfactory, jobsite fabrication techniques. In many instances, the authority to decide what products or methods of fabrication will be used rests exclusively with the architect, the consulting engineer, the project owner, or the manufacturer of the product in question, and the jobsite contractor is simply hired to install the completed product in accordance with their specifications. Nevertheless, building trades unions frequently seek to exclude prefabricated products from the project to force other modifications in the project specifications by striking or threatening to strike the subcontractor who employs their members on the job. Application of the "right to control" test effectuates the Congressional purpose of Section 8(b)(4)(B) by providing jobsite contractors with effective protection against involvement in such disputes when they are powerless to resolve them. It also protects the right of architects, engineers, builders and manufacturers to utilize the products and fabrication techniques best suited to the needs of their projects without interference from unions to whom they owe no bargaining duty.

5. The associations joining this motion have a substantial interest in the continued application of the "right to control" test. They represent a broad cross-section of the construction industry, including the designers, specifiers, manufacturers and installers of products and materials used in construction throughout the United States. The associations join-

ing herein have broad knowledge of problems arising out of efforts to exclude manufactured products from construction sites and of the effectiveness of the "right to control" doctrine in preventing such efforts. In particular, they have had experience with a number of product boycott attributable, at least in part, to the present uncertainty about the validity of the "right to control" test. They have participated individually and jointly in numerous cases before the NLRB and the courts in which the validity and application of the doctrine have been litigated, including joint participation as *amici curiae* in the proceedings before the court of appeals in the instant case. Because of this background and the extensive experience their constituents have had with product boycotts, the associations joining herein are uniquely situated to brief this Court on the practical, as well as the legal, aspects of the issues presented in this case.

WHEREFORE it is respectfully moved that the above-named associations be granted leave to submit the accompanying brief as *amici curiae* on the merits of this case.

Respectfully submitted,

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Dated at Washington, D.C.,
this 30th day of April, 1976.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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NATIONAL LABOR RELATIONS BOARD,
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v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AIR-CONDITIONING AND REFRIGERATION INSTITUTE, ASSOCIATED BUILDERS AND CONTRACTORS, INC., AMERICAN BOILER MANUFACTURERS ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, THE AMERICAN INSTITUTE OF ARCHITECTS, AIR MOVING AND CONDITIONING ASSOCIATION, INC., ARCHITECTURAL WOODWORK INSTITUTE, MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, INC., NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, AS AMICI CURIAE

INTRODUCTION

This brief is submitted, contingent upon the Court's granting of the accompanying Motion for Leave, pursuant to Rule 42(3) of the Rules of this Court, on behalf of Air-Conditioning and Refrigeration Institute, Associated Builders and Contractors, Inc., American Boiler Manufacturers Association, American Consulting Engineers Council, The American Institute of Architects, Air Moving and Conditioning Association, Inc., Architectural Woodwork Institute, Mechanical Contractors Association of America, Inc., National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association, as *amici curiae*. The *amici* support the position of the petitioner, the National Labor Relations Board, in the instant case.

INTEREST OF THE AMICI CURIAE

The associations participating in this joint brief represent a broad cross-section of the manufacturers, designers, specifiers and installers of products and materials used in construction throughout the United States. They have participated individually and jointly in numerous cases before the National Labor Relations Board, the lower federal courts and this Court presenting issues relating to the legality of boycotts of prefabricated products in the construction industry. They participated jointly as *amici curiae* before the NLRB and the court of appeals in *Local 438, United Ass'n*, 201 NLRB 59 (1973), enf'd sub. nom. *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973), in which the Board re-

stated and clarified, and the court approved, the so-called "right to control" test for determining whether a party subjected to union pressures in furtherance of a product boycott is a neutral entitled to the protection of Section 8(b)(4)(B) of the Act. They also participated as *amici curiae* before the courts of appeals in the instant case and in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975), both of which cases raised issues concerning the "right to control" test in the context of construction industry product boycotts.

While the *amici* thus have a substantial common interest in the issues presented in this case, they have varying economic stakes in the outcome of these proceedings. The interest of each of the *amici* is set forth below.

A. Air-Conditioning and Refrigeration Institute (ARI)

ARI is a national trade association consisting of approximately 175 manufacturing companies in the air-conditioning and refrigeration industry. These companies are the principal manufacturers of the end-products and components in this industry, which has a total volume annually in excess of $3.4 billion. Plants of ARI members are located throughout the United States and the air-conditioning and refrigeration equipment they manufacture is sold and shipped to every state and to foreign countries.

Among the end-products manufactured by ARI's members and certain others are so-called "packaged" equipment. These are products which are manufactured, assembled, and by necessity tested for safety

and efficiency at the factory, and then shipped to the job site for installation in a residence, apartment house, office building, factory or commercial establishment. Units of this type are the subject of the Union's boycott in the instant case.

ARI members have a substantial and long-standing interest in the development of the law concerning product boycotts, since the freedom to install their products on construction sites is essential to the orderly distribution of such products. Frequently they have been involved in attempts by unions to prevent installation of their products, including instances which were the subject of litigation before the Board and the courts. See, e.g., *Local 636, United Association (Mechanical Contractors Association of Detroit, Inc.)*, 177 NLRB 189, rev'd. *Local Union No. 636, United Association* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir. 1970); *Local 636, United Association*, 189 NLRB 661 (1971).

B. Associated Builders and Contractors, Inc. (ABC)

ABC is a nonprofit incorporated association with over 7,000 member firms who are largely construction contractors and firms who do business with the contract construction industry. The value of construction work performed by its members exceeds $4,000,000,000 annually.

ABC members have frequently encountered problems in connection with efforts of building trades unions to prevent the installation of factory made components despite the contractors' lack of control over such components.

C. American Boiler Manufacturers Association (ABMA)

ABMA is a trade association composed of 87 member companies engaged in the manufacture and sale of primary heat and power generating equipment, fuel burning systems, and air pollution control systems. These companies, which are located throughout the United States, are the principal manufacturers of packaged boilers and components. A packaged boiler is a complete, prefabricated, steam-generating unit. It requires no further fabrication work after it leaves the factory; it need only be installed at the place of operation. Packaged boilers are made in factories utilizing assembly-line production methods and employing trained specialists. Almost all are shop-tested and inspected prior to shipment, warranted against defects, and bear an Underwriters Laboratory Seal indicating conformance with specified standards.

ABMA members have manufactured packaged boilers since 1932. Their annual production of such boilers now exceeds $100,000,000 annually. The increased demand for their products in recent years is responsive to many factors, including, a unit design which assures better quality and greater efficiency, a lower price, and the fact of single-manufacturer responsibility for defects and malfunctioning.

Some of ABMA's efforts to combat boycotts against packaged boilers are set out in *ABMA* v. *N.L.R.B.*, 404 F.2d 547 and 404 F.2d 556 (8th Cir., 1968), cert. den. 398 U.S. 960 (1970).

D. American Consulting Engineers Council (ACEC)

ACEC is a federation of state and regional associations comprising some 2,600 independent engineering firms. These firms range from highly specialized sole proprietors to large, multioffice general practitioners. The firms represent more than 7,000 legally registered (in accord with state laws) principals and partners, plus more than 40,000 engineering technicians and other employees.

Consulting engineering is a $3 billion per year U.S. industry. Firms design: airports, bridges, dams, harbors, parks, power plants, stadia, waste treatment plants and similar facilities worth $35 billion.

The objectives of the ACEC include: protection of public interest, expansion of engineering technology, improvement of the standards of consulting engineering practice and advancement of the engineering professional in general. Member companies must observe high professional and ethical standards and are prohibited from maintaining any commercial, manufacturing or other affiliation which might influence the selection or specification of equipment, methods or materials used on their projects. In carrying out these objectives, ACEC has frequently experienced the adverse effect of union restrictions on the use of new and improved products and technology.

E. The American Institute of Architects (AIA)

The AIA is the national society for the architectural profession and represents 24,000 licensed practitioners. Architects play a major role in determining the man-made environment in which we spend

85 percent of our lives. Their design decisions on behalf of their clients, affecting tens of billions of dollars of construction annually, are translated through drawings and written specifications into our physical environment.

The architect constantly seeks innovative approaches to improve the built environment as well as to foster efficiency and progress. To achieve these objectives, the architect's designs, drawings, and written specifications require sufficient legal protection to enable them to benefit the client and the general public. To protect the public from the random and potentially harmful effects of a malconstructed environment that may be caused by unwarranted intrusions in the process of implementing the architect's design, it is essential that the architect retain unimpeded control over the components, materials and methods used during the entire duration of the project.

F. Air Moving and Conditioning Association, Inc. (AMCA)

AMCA is an international trade association comprised of companies manufacturing fans and other air moving devices used in industrial and commercial ventilating and air-conditioning systems. An affiliated division includes manufacturers of louvers, dampers and shutters. The total membership includes 67 U. S. manufacturers. Products which they produce are valued at approximately $200,000,000 annually. The Association owns and operates its own testing laboratory at its headquarters in Arlington Heights, Illinois.

The principal activities of AMCA include the promulgation of performance test standards for its

products and the administration of certification programs covering published performance ratings. These programs are designed to insure that the user gets the performance from a product which is claimed by its published ratings. For the program to be effective, it is essential that the purchaser or his agent has the right to select the equipment which, in his judgment, is best suited for his use. Consequently, any unnecessary or unwarranted restrictions on that right are of great concern to AMCA and its members.

G. Architectural Woodwork Institute (AWI)

AWI is a national trade association of 380 manufacturers and distributors of architectural woodwork. Products of its members consist of a wide variety of precut, prefit or preassembled items or materials, such as beams, special windows, doors, wall paneling, cabinet work and all forms of custom mill work for architectural and aesthetic purposes, used in homes, public buildings, schools and churches. The total volume of such products produced by AWI members approximates $150,000,000 annually.

Building trades unions have frequently hampered the sale and distribution of products of the type manufactured by AWI members. Consequently, AWI is deeply concerned about the development and implementation of laws dealing with eliminating restrictions on use and installation of the products manufactured by its members.

H. Mechanical Contractors Association of America, Inc. (MCAA)

MCAA is a national association of contractors engaged primarily in heating, air conditioning, plumbing, service work and industrial and process piping, with approximately 1400 contractor members in the United States. These contractors employ over 90,000 persons, and do an annual volume of business in excess of $7 billion.

Approximately 75 percent of said contractors belong to local associations which are affiliated with MCAA. The remaining 25 percent are affiliated directly with MCAA, without membership in any intermediate association. MCAA has 57 affiliated local associations.

Types of prefabricated equipment installed by MCAA members include air conditioning and refrigerating equipment, heat exchangers, waste heat boilers, steam generator sets, gas and air compressors, fuel oil pumping and heating units, gas purifiers, gas and oil fired heaters, coal and ash systems, demineralizers, desuperheater stations, air conveying systems, hydrogen and hydrogen chloride units, hydrogen cyanide and hydrogen sulfide assemblies, unipak gasoline plants, and sterilizing units.

The issue presented in this case is of fundamental importance to MCAA. The ability to install modern preassembled equipment and appurtenances, without artificial encumbrances which limit efficiency and increase costs, is essential to our economy and to our contractors installing such equipment.

I. National Electrical Manufacturers Association (NEMA)

NEMA is a national trade association consisting of approximately 540 members who manufacture, *inter alia*, electrical control panels, enclosed switches, panel boards, industrial controls, conduit fittings,

outlet and switch boxes and wiring devices installed in all types of structures during their erection on construction sites. Total sales of the electrical manufacturing industry in 1973 amounted to over $58 billion.

Union efforts to interfere with installation and use of products manufactured by NEMA members have adversely affected the sale and installation of such products.

J. National Society of Professional Engineers (NSPE)

NSPE is composed of 67,000 members through 53 affiliated state organizations (including the District of Columbia, Puerto Rico and Guam) and approximately 500 local chapters. The members are involved in all fields of engineering practice and all branches of engineering.

Approximately 13,000 of the Society members are engaged in the private practice of engineering and will be particularly and seriously affected by any change in the law applicable to product boycotts which diminishes their right to specify certain products and equipment for projects.

Also, many members of the Society are engaged in engineering activity for industry and for federal, state and local governments and have a substantial interest as representatives of clients of engineers in private practice on the issue before the Court.

The NSPE was organized in 1934 for the "advancement of the public welfare and the promotion of the professional, social and economic interests of the engineering profession" and in accordance with

that purpose has actively participated in the development and enactment of labor legislation affecting the interests of engineers and has participated in cases involving engineers before the NLRB and courts as *amicus curiae*.

K. National Woodwork Manufacturers Association (NWMA)

NWMA actively represents the interests of wood door, window and millwork manufacturers. Its membership currently includes approximately 90 manufacturers and 20 associates who are suppliers to the industry. Their production represents the majority of wood windows and doors made in the United States and amounts to approximately $300,000,000 annually.

NWMA members deal with all members of the construction team: the architect, the supplier, and the builder. They are well versed in all areas of building and component costs involved. Their products are used in all types of construction, including private, single-family homes; government project housing; apartment housing; and commercial buildings. Their primary concern has been the manufacture of high quality products at reasonable prices.

NWMA's interest in union restrictions on use of manufactured products on construction sites is exemplified by its role as charging party in the proceedings which culminated in the decision of this Court in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

THE POSITION OF THE AMICI CURIAE

As set forth more fully in the argument, the *amici curiae* joining in this brief urge the Court to approve the "right to control" doctrine, as applied by the Board, as a valid test for determining whether union pressures to prevent the use of factory fabricated products in the construction industry have been directed at neutrals entitled to the protection of Section 8(b)(4)(B) of the Act.

The practical need for a clear, effective method of determining the legality or illegality of product boycotts on construction sites is imperative. The "right to control" doctrine provides such a method. It is the logical outgrowth of over 28 years of Board experience in implementing Section 8(b)(4). It is fully consistent with the legislative purposes as set out in the Labor Management Relations Act of 1947 and amendments included in Title VII of the Labor-Management Reporting and Disclosure Act of 1959. It is neither rejected nor weakened by the *National Woodwork* decision and is consistent with other U.S. Supreme Court decisions and with the policies of the federal antitrust laws.

ARGUMENT

THE "RIGHT TO CONTROL" TEST, AS APPLIED BY THE LABOR BOARD, IS A VALID, PRACTICAL TEST FOR DETERMINING WHETHER EMPLOYERS SUBJECTED TO UNION PRESSURES IN FURTHERANCE OF PRODUCT BOYCOTTS ARE NEUTRALS ENTITLED TO THE PROTECTION OF SECTION 8(b)(4)(B) OF THE ACT

I. Introduction

In the recent *Koch* case,[1] the Board re-examined and, to an extent, redefined its policies with respect to the effectuation of product boycotts through secondary pressures in the construction industry. Recognizing that criticism from some courts and commentators of its "right to control test" may have stemmed in part from the Board's use of that label without fully explicating the rationale for its decisions, the Board undertook to clarify the weight it ascribes to a pressured employer's "contract right of control," or lack of it, in determining whether pressures against him were primary or secondary. The Board also clarified the interrelationship of the "control" element with other factors it considers in making this determination, emphasizing that it does not apply a rigid *per se* or mechanical test.

Nevertheless, the Board made it clear that it adheres to the basic view that the struck employer's control, or lack thereof, over the assignment of particular disputed work is a principal criterion which must be considered in determining whether union

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[1] *Local No. 438, United Ass'n*, 201 NLRB 59 (1973), 82 LRRM 1113, enf'd sub nom. *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973).

pressures against that employer are undertaken for their effect on him or on someone else. "[W]here the pressured employer cannot himself accede to the union's wishes," the Board stated, it normally follows that "the pressure is secondary because it is undertaken for its effect elsewhere." (*Koch, supra*, 201 NLRB at 63). In reconfirming this approach, the Board expressly noted its continuing disagreement with the courts of appeals panels which have held, in effect, that whenever a union is seeking to "preserve" work for the employees it represents, it may do so by economic action against their immediate employer, regardless of whether or not he has the power to award such work. (*Ibid.*).

The Board's disagreement with the critics of the "right to control" test then, is more than a mere semantic dispute over the proper phraseology of the standard to be applied by the Board in such cases. Indeed, the court below declared broadly that the Board's view "impermissibly expands the Congressionally intended scope of Section 8(b)(4)(B)." (521 F.2d at 889). The ultimate issue, therefore, is whether building trades unions will be allowed, under the banner of "work preservation," to engage in work stoppages and refusals to handle prefabricated materials directed against contractors and subcontractors who are powerless to award the unions the work they seek and who must therefore rely on others—the project owners, designers and general contractors—to make the concessions necessary to end the labor dispute and relieve the subcontractors from the union's pressures. As we show below, the final resolution of this issue will have an important

impact on the construction industry and the economy in general.

From the outset, we respectfully urge that the Court consider the issues presented in this case in the context of the real world in which we live and not as an intellectual exercise in legalistic abstractions. Too often court opinions interpreting Section 8(b)(4) and 8(e) have exhaustively discussed nuances of primary and secondary conduct, speculative theories of exceptions to the statutory language unexpressed by the Congress, and a variety of hypotheses for avoiding implementing the restrictions on union activity embodied in the law. Too often the courts have, as Mr. Justice Stewart said in his dissent in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 650 (1967), ". . . [undertaken] a protracted review of legislative and decisional history in an effort to show that the clear words of the statute should be disregarded in these cases."

The success of an administrative agency in performing its function of interpreting and enforcing confusing, and sometimes ambiguous, language rests on the ability of the agency to devise practical methods for implementing the Congressional purpose as expressed in the statute. The courts have given such agencies, including the Board, great leeway in accomplishing this purpose. See, *e.g.*, *Local 1976, United Bhd. of Carpenters, et al.* v. *N.L.R.B.*, 357 U.S. 93, 107 (1958). The right to control doctrine, as evolved and implemented by the Board, is an excellent example of effective interpretation of a complex statute and of the Board's expertise in devising and implementing a logical and understandable means of carrying out the intent of Congress.

Therefore, we urge that the Court, while considering the specific legal questions raised in this proceeding, reflect also upon the practical consequences for the construction industry flowing from the Board's decision in this case as compared with the consequences of the court of appeals' decision.

II. The Right to Control Doctrine Is A Necessary and Effective Tool in Implementing the Congressional Intent to Eliminate Secondary Product Boycotts

Congress recognized in 1947, when it included secondary boycott restrictions in the Taft-Hartley amendments, that efficiency in construction depends, in large measure, on the elimination of product boycotts. The legislative history surrounding the 1959 Landrum-Griffin amendments may not be a model of clarity, but it is unmistakable that Congress, in amending Section 8(b)(4) and enacting Section 8(e), was attempting to close the loopholes that had developed in these restrictions.[2] The right to control doctrine, as applied in current Board decisions, offers an effective method to implement these Congressional efforts to eliminate secondary boycotts. Rejection of the doctrine, on the other hand, would inevitably weaken the available protection against such costly and restrictive union practices, with a resultant impact on the construction industry that our economy can ill afford to bear.

In the 25 years since the enactment of Section 8(b)(4), experience has demonstrated repeatedly the

[2] See, e.g., II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1431 (Sen. Kennedy), 1568 (Cong. Griffin); Morris, *The Developing Labor Law* (1971), pp. 57, 609-610.

need for establishing understandable guidelines to delineate between lawful primary and unlawful secondary union objectives. Secondary boycotts generally take place at times of substantial pressures on neutrals, employees, and employers with widely varying interests. In construction particularly, the dispute cannot await litigation, for the project is completed long before formal proceedings are resolved. Therefore all concerned need clear and unambiguous rules which enable the parties to recognize their rights and obligations. When such rules are available, problems are resolved without disruptive tests of economic strength and, indeed, usually without litigation. The Board's decision in the case below, by clearly recognizing the "right to control" the disputed work as one of the principal criteria for identifying the locus of the union's real "tactical object", have provided such an understandable, effective standard.

The experience of members of the American Boiler Manufacturers Association, one of the *amici* on this brief, is an illustration. Since 1932 ABMA members have manufactured packaged, or factory-assembled boilers. Sales have steadily increased because of the unit design of the boilers. This assures better quality, greater efficiency, lower price and broader warranties against defects and malfunctions.

In 1963 ABMA members became the target of a concerted effort by the United Association (the international union involved in this case) to prevent the use and installation of packaged boilers larger than a certain size. In carrying out its campaign, the union sought and obtained restrictive work fabri-

cation clauses in its agreements with mechanical contractors and also invoked product boycotts by refusing to install packaged boilers. In 1963, ABMA filed section 8(e) and 8(b)(4) charges to test the legality of the union's conduct and to forestall the serious threat to continued use of packaged boilers. These charges culminated in *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d 547; 404 F.2d 556; (8th Cir., 1968), cert. den. 398 U.S. 960 (1970).

During the seven years required to litigate these charges, the union did not actively pursue its earlier program but, nevertheless, throughout that period and continuing to date, there have been instances where UA locals have attempted to prevent the use of such boilers. Thus, since the *National Woodwork* case decision in mid-1967, ABMA members have reported 12 instances of refusals by UA locals to install packaged boilers.[3] In each case, when the situation was analyzed in the light of the "right to control" doctrine, the legal rights of the parties became clear, the problem was resolved informally and the boilers were installed. In only two instances was it necessary to file unfair labor practice charges and, on both occasions, the problem was handled as soon as the NLRB General Counsel obtained Section 10 (1) injunctions. [*Local 638, UA (Blackhawk Heating)*, Board Case No. 29-CC-202; *Local 638, UA (State University of New York)*, Board Case No. 29-CC-213-214.] No serious conflicts developed in these cases, because the elements of applicable Board

[3] ABMA officials believe there were other similar incidents but only these were reported to the ABMA headquarters.

law could be established quickly and objectively, and the parties could accurately predict the outcome of an economic contest or litigation.

If the reach of the *National Woodwork* opinion is to be over-extended, as we submit is done by the decision of the court of appeals below, and the test of "secondary" activity set out there is to be used, we believe that the foregoing instances of refusals to install packaged boilers would not have been so readily resolved. The court of appeals expressly recognized that under its approach, the distinction between primary and secondary activity would often be a "subtle and difficult one to make." (521 F.2d at 893). If this is true for the NLRB and the courts, certainly the problem could not have been resolved with any degree of assurance by the parties themselves.

The Board's approach, on the other hand, is readily understood and applied by parties to a construction dispute, because it accords with their practical knowledge and experience. They know that when a union exerts pressure against a subcontractor who, through no fault of his own, lacks the power to control assignment of the work the union is seeking, the union's real objective is normally to force a concession by someone else, outside the context of the immediate bargaining relationship. This is not to say that the Board's formula automatically requires that result; the Board has made it clear that it will find exceptions where the circumstances indicate that the dispute is confined to the immediate employer, despite his lack of "control." But in most situations, the Board's approach leaves little room

for disagreement. By according the pressured employer's lack of control over the work the full probative weight it logically deserves, the Board's test makes it possible in the great majority of cases to distinguish easily between union activity which is undertaken for its effect on the immediate employer and that which is, in the words of *National Woodwork*, "tactically calculated to satisfy union objectives elsewhere."

Thus, the "right to control" test, as evolved, refined and currently applied by the Board, is of immense practical value in effectuating the Taft-Hartley provisions. It implements the intent of Congress to eliminate secondary boycotts in the construction industry, where practical realities are such that a less logical, less readily understood standard, such as that advocated by the majority of the court below, would inevitably lead to delays which would render the Act's boycott protection largely illusory.

The *amici* who have joined in this brief know from first-hand experience that effective enforcement of these statutory provisions is essential to permit technological growth and free competition in the construction industry. As designers and specifiers, they must have assurance that the products they believe necessary to the utility, economics and aesthetics of the projects on which they work can be used without arbitrary and artificial restrictions. As manufacturers they must be free to design and manufacture new and improved products that take advantage of advancing technology and increase productivity of construction labor. As contractors they must be protected from being caught between demands of

designers and users to use factory built products and unions who would prevent their installation.

Effective protection against product boycott leads to the essential goal of higher quality construction at lower cost. It is the responsibility of the *amici* to their clients and customers to achieve this end. This goal is beneficial to the public and is in harmony with governmental programs to reach the same result. Higher quality at lower cost is not obtainable, however, without a clear understanding that those who have the responsibility and bear the liability for the success or failure of the necessary new and improved products and techniques must have control over their use.

As specifiers, the *amici* must determine whether a manufactured product should be used on a particular construction project. They are liable if they err. As manufacturers, they must furnish a product that meets specifications. Often they must supply warranties that it will do so. They are liable for any failure. As contractors they must install and place in operation the products specified. Also, they are liable if they do not perform according to instructions. All of the *amici* are continually trying to achieve the highest possible safety standards in the design, manufacture, installation and use of products with which they deal. Both federal and state occupational health and safety laws have rapidly expanded, increasing their responsibility in this area. More accurate and effective tests to assure product safety can be performed in the factory than on the jobsite. When union restrictions force disassembly of a factory built component, approvals

by authorities such as Underwriters Laboratory are invalidated.

When unions are able to set aside these obligations and interfere with the manufacturers' control over the work to be performed, quality is lowered, prices are increased and productivity is impeded. The manufacturer is prevented from fulfilling his function and, frequently, must bear the liability for his inability to do so. Users and the public share the burden of higher costs and lower quality.

We are not unmindful of this Court's observation in *National Woodwork*, *supra*, that is for Congress, and not the courts, to conduct any "re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation" and to determine what kinds of economic weapons should be available to unions and in what general circumstances. 386 U.S. at 644. We do not believe, however, that these considerations should in any way foreclose the Court from considering the practical and economic consequences of the Board's interpretation of the Act, as discussed above, compared with the consequences of the interpretation suggested by the majority of the court below, for the purpose of determining which approach is best calculated to effectuate the purposes of the existing statutory provisions. Particularly in this area, where excerpts of the same legislative record are frequently cited by opposing parties in support of contradictory positions, it is only through an understanding of the practical effects of the Board's and the court of appeals' decision that this Court can accurately judge which approach is most in keeping with the basic concerns that motivated Congress to

enact the boycott prohibitions of the Taft-Hartley and Landrum-Griffin amendments.

III. The Board's Approach Accords the Pressured Subcontractor's Lack of Control Only the Weight It Logically Deserves In Determining Whether the "Tactical Object" of the Union's Pressure Was "Elsewhere"

A. *The Board's Role in Determining Tests for Secondary Activity*

It is well-settled that a violation of Section 8(b)(4)(B) is dependent upon a finding of secondary activity. The problem lies in the method of identifying such activity. Conduct directed at an employer with whom the union has a dispute is "primary" activity and lawful under the statute. Conduct directed at others is secondary and unlawful. *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 635 (1967); *Local 761, Electrical Workers (General Electric)* v. *N.L.R.B.*, 366 U.S. 667, 672-673 (1961). Drawing the line between primary and secondary activity has not been easy and has, therefore, been marked by an evolutionary process. In the words of Mr. Justice Frankfurter:

> The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply § 8(b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience. 'One of the purposes which lead to the creation of such boards is to have decisions

based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.' *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 800; *Local 761, Electrical Workers (General Electric)* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961).

The Board's decision in the present case is the natural result of this evolutionary process going on over a long period of time. Because a definitive formula may not have been wise when the statute was first enacted, it does not follow that a clearly understandable rule cannot evolve after years of experience.

The Board has the initial responsibility for making determinations of secondary activity, and its efforts to draw appropriate lines and establish rules for doing so have been widely accepted in the past. *Local 761, Electrical Workers* v. *N.L.R.B.*, *supra*, 366 U.S. at 671-680; *Local 1976, United Bhd. of Carpenters, et al.* v. *N.L.R.B.*, 357 U.S. 93 (1958); *Houston Insulation Contractors' Ass'n* v. *N.L.R.B.*, 386 U.S. 664 (1967). Such rules express a "practical judgment on the effect of union conduct in the framework of actual labor disputes and what is necessary to preserve to the employer the freedom of choice that Congress has decreed. On such a matter, the judgment of the Board must be given great weight, and we ought not to set against it our estimate of the relevant factors." *Local 1976, United Bhd. of Carpenters, et al.* v. *N.L.R.B.*, 357 U.S. 93, 107 (1958).

B. *The Board's Formula In Operation*

As noted earlier, the Board thoroughly reconsidered its "right to control" doctrine in 1973 in the *Koch* case, *supra*, following several court of appeals decisions expressing the belief that the Board was applying the doctrine as a *per se* test in a manner inconsistent with this Court's decision in *National Woodwork*. In *Koch*, the Board explained that its approach involves two basic steps, each requiring an analysis of the relevant facts and circumstances. First, the Board stated, it examines the factual context to determine whether the union had a valid "work preservation" objective. But, unlike the courts that have criticized its approach, the Board does not end its inquiry there, for it recognizes that even action undertaken to preserve work opportunities for members of the immediate bargaining unit is secondary if its "tactical object" is to force a concession by some other person, not a party to the union's bargaining relationship with the pressured employer. Accordingly, the Board proceeds to consider also whether the union, in pursuing its objective, directed its pressures "at the right person, i.e., the primary in the dispute." 201 NLRB at 64.

This second step of the Board's analysis also entails an examination of the surrounding circumstances. In this respect, of course, the power to control the assignment of the disputed work is of great significance, since it can reasonably be assumed that the ultimate target of a union's economic pressures (i.e., the "primary" in the dispute) will ordinarily be the party having the authority to grant the union

the concessions it seeks.[4] But the Board made it clear that it also takes account of any circumstances pointing to a contrary conclusion, and it has on occasion ruled that economic pressures directed against an employer lacking the "right of control" were nevertheless lawful because the facts showed he was "not truly an 'unoffending employer.'" (201 NLRB at 64).[5] This affords ample protection to employees against deliberate action by their employer to deprive them of the benefits of a valid "work preservation" agreement,[6] without subjecting the employer to eco-

[4] See *Ohio Valley Carpenters District Council (Cardinal Industries Inc.)* v. *N.L.R.B.*, 339 F.2d 142, 145 (6th Cir. 1964), enforcing 144 NLRB 91, "It is reasonable to hold that the object of the union was not an impossible act but was the alternative possible." Essentially, this is but a recognition of the fundamental labor law principle that a party must be presumed to have intended the "natural consequences of his action." *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 45 (1954).

[5] By way of example, the Board cited *Painters District Council No. 20 (Uni-Coat Spray Painting Inc.)*, 185 NLRB No. 136, wherein it found that a subcontractor who took an active role in seeking a license and subcontract which it knew would cause it to breach its "work preservation" agreement with the union could not be deemed an "unoffending employer" entitled to protection under Section 8(b)(4). See also, *Pipe Fitters, Local No. 120, United Ass'n*, 168 NLRB 991, 992 (1967).

[6] The Board also noted that its decision in no way forecloses the union's right to seek a remedy for the contractor's alleged breach of a valid "work preservation" agreement through a civil suit. We submit, however, that to the extent a facially valid "work preservation" agreement is interpreted or applied in a secondary manner, enforcement through judicial action is just as unlawful as enforcement through economic means. See discussion at pp. 32-35, *infra*.

nomic pressure when he merely engages in his business on the terms available to him.

The Board obviously gives the pressured subcontractor's lack of "control" considerable weight in determining whether the union directed its pressure at the proper target, but, as shown above, where warranted by the circumstances, the Board has been willing to find exceptions to the rule. While the Board's approach thus is far from "mechanical", it is easily understandable because it is logical and consistent with the realities of everyday labor-management relations. By recognizing that the "tactical object" of a boycott or work stoppage (in the language of *National Woodwork*) is ordinarily the party having power to accede to the union's demands, the Board merely demonstrates an accurate understanding of fundamental labor relations tactics. The Board's reasoning is thus readily understood and applied by industry and union representatives, because it accords with what they know through experience. There is no vice in simplicity nor virtue in complexity. The validity of the Board's approach must be determined by its effectiveness in accomplishing the ends Congress intended.

The Board's formula gives the control factor neither more nor less weight than it logically deserves. There may be rare exceptions, but, when a union persists in striking an employer who is powerless to comply with its demands, both experience and common sense lead to the conclusion that the real object of the union is to force the struck employer to bring pressure upon the party who does have control over the subject matter of the dispute. For it is clear that in these circumstances the union's real dispute

is not with the struck employer, but with the employer with the right of control. It is the latter employer who created the situation which the union finds unfavorable, and who is the only employer that can remedy the situation. Under these circumstances the most, if not the only, reasonable presumption is that union pressure on an employer who cannot satisfy the union's demands is, in fact, directed at another employer.

In some instances the struck employer may be willing to accommodate the desires of the union or in fact may wish to do so, but cannot because of his contract with the other employer. *Koch*, *supra*, 201 NLRB at 62, n.15, and 490 F.2d at 328. In this situation, the struck employer is in the position of a neutral between the two disputing parties. On the other hand, these same presumptions are not applicable where the struck employer himself has the right to control the matter in dispute. For there the gain from the strike is obvious, and intermediate parties are not embroiled in the application of pressure on the party with control to end the dispute.

Application of the foregoing rationale to the facts of this case is illustrative of both the logic and the sophistication of the Board's formula. Not only did the Board's reasoning reach the logical conclusion of identifying general contractor Austin, the party who had specified the boycotted product and the only one with power to change the specifications, as the ultimate target of the Union's pressure, but in doing so the Board took careful account of the nature of the dispute and how it developed. It pointed out facts indicating that there never was any genuine labor dispute between subcontractor Hudik and the Union

—i.e., that the work in question was not and never had been Hudik's to award; that Hudik was incapable of assigning the work; and that the Union had clearly communicated its refusal to install the Slant/Fin units and the reasons for such refusal to Austin as well as to Hudik. The Board's test, as thus applied, is neither "artificial" nor "mechanical" (*Local 742, Carpenters* v. *N.L.R.B.* [*J. L. Simmons Co.*], 404 F.2d 895 (1971)), but rather a logical and systematic method for determining the Union's true objective in light of all the relevant surrounding circumstances.

C. *The Court of Appeals' Criticisms of the Board's Approach Are Without Merit*

The majority of the court below expresses the belief that the Board's focus on the subcontractor's inability to award the union the work in question misses the primary-secondary distinction in *National Woodwork*. The majority opinion views this distinction as turning on whether the employees have an ongoing dispute with their own employer relating to their claim to the work in question. If so, by reason of their desire to "preserve" their work, the effect on all others is incidental. This reasoning, however, is inconsistent with the *Denver Building Trades* case,[7] and the *Sand Door* case,[8] and subsequent legislative action.

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[7] *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675 (1951).

[8] *Local 1976, United Bhd. of Carpenters* v. *N.L.R.B.*, 357 U.S. 93 (1958).

In *Denver Building Trades*, this Court emphasized that, since there was a contract between the employer subject to the union pressure and another contractor, the situation was materially different from one in which no such contract existed and there was therefore no question of a second contractor being forced off the job. The Court clearly found there that the attempt to force termination of that contract was an illegal secondary objective. Exactly the same situation is found in the present case. The Union's purported objective of "preserving" work or affecting only the relations with the immediate employer, Hudik, could not be accomplished without forcing termination or modification of the contract with Austin, who controlled the work. As the Fourth Circuit recognized in *Koch* (490 F.2d at 326) this Court's decision in *Burns and Roe* clearly establishes the illegality of such an objective under Section 8(b)(4)(B).[9]

Sand Door involved a refusal by the Carpenters' Union, pursuant to a restrictive work practice contract between the union and a contractor, to hang doors made by a non-union manufacturer. This Court found the agreement lawful but that, even though lawful, the contract would not validate union inducement of the contractor's employees not to handle the goods. Congress, in enacting Section 8(e) the following year, made clear that it was attempting to close the loophole opened by *Sand Door* rather than intending to weaken the application of that case. Conference Report (House) No. 1147 on S. 1555, p. 39.

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[9] *N.L.R.B.* v. *Local 825 Operating Engineers (Burns and Roe, Inc.)*, 400 U.S. 297 (1971).

Because *National Woodwork* interprets Section 8(e) as validating work preservation agreements, it does not follow that the case also protects union pressures of the very type found unlawful in *Sand Door* and which Congress specifically said remained unchanged. Yet interpretation of the primary-secondary distinction in *National Woodwork* espoused by the majority of the court below leads to that result and ignores *Sand Door* and the Congressional action completely.

Nor is there any merit to the court of appeals majority's suggestion that the pressure against Hudik-Ross was not for a secondary objective because it might have been possible for Hudik-Ross to obtain relief from the pressure by negotiating a "settlement" with the Union. Not only is this theory entirely speculative, since there is no suggestion in this case that the Union ever wanted to negotiate a "settlement" rather than to be given the work, but it reflects a view of the scope of Section 8(b)(4)(B) which is completely contrary to the intent of the Act.

Initially, the court's view ignores the well-settled principle enunciated in *Denver Bldg. Trades*, *supra*, 341 U.S. at 680, and reaffirmed in *Burns and Roe*, *supra*, 400 U.S. at 303-304, that it is "sufficient [for a Section 8(b)(4)(B) violation] that an objective . . . although not necessarily the only objective," be secondary. Thus, even if the Union might have been willing to forego the actual assignment of the work in favor of some negotiated compromise payment, there can be no real doubt that the assignment of the work to the jobsite employees was at least *an* object of the Union's conduct. Indeed, the very es-

sence of any negotiated "compromise" with the subcontractor would be a recognition that the Union was accepting something in lieu of its basic objective—assignment of the work to its members. The Union's continuing, fundamental goal would still be to have the work performed on the site by journeymen steamfitters, rather than in the manufacturer's plants. And since that basic goal was tactically obtainable only by forcing a concession or change of policy by someone other than the subcontractor, the Union's objective "was unmistakably and flagrantly secondary" (*N.L.R.B.* v. *Local 825, Operating Engineers (Burns and Roe, Inc.), supra*, 400 U.S. at 304), despite the possibility of a negotiated settlement.[10]

Furthermore, the opinion of the majority below rests heavily on the bootstrapping argument that Hudik-Ross could not be considered a neutral because Hudik-Ross had "violated" its "work-preservation"

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[10] Indeed, the majority of the court below appears to acknowledge that at least one objective of the Union's pressure against Hudik-Ross was to cause a change of policy by others. Thus, the court recited the administrative law judge's rhetorical question, "[I]f Hudik . . . does not bid on jobs and does not secure subcontracts, how does such a situation preserve or increase work for Hudik's union steamfitters[?]," and then goes on to state that the answer could be found in the ALJ's own observation that "if prepaid [sic] units cannot be installed . . . Austin and other engineers and general contractors will not specify their purchase and use in buildings." 521 F.2d at 896, n. 25. The majority's opinion, however, reveals its misconception of the primary-secondary distinction by concluding that even conduct with this admitted tactical object is lawful as long as it is undertaken for the benefit of employees in the immediate bargaining unit.

agreement with the Union by bidding on a subcontract which called for the use of prefabricated components. This argument, in turn, rests on the premise that a union can lawfully extend an employer's obligation under such an agreement to any work of a type which its members have traditionally performed, even if the particular work in question is within the exclusive control of another.[11] In other words, the union may enforce a "work preservation" clause so as to require a subcontractor, not only to assign all work of a particular type to his jobsite employees when he has the power to do so, but also to refuse to do business with any general contractor, engineer or other person who will not permit the work to be done by the jobsite employees. We submit that this premise is squarely contrary to Section 8(e) of the Act and is unwarranted by this Court's decision in *National Woodwork*.

As the Ninth Circuit recently stated in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433, 438 (1975), commenting upon the interrelationship of *National Woodwork* and the "right to control" doctrine:

> *A union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign.* When it is applied to work beyond the employer's power to give, a work preservation clause necessarily embodies a prohibited secondary objective. (Emphasis added).

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[11] See also *Local 742, Carpenters* v. *N.L.R.B. (J. L. Simmons Co.)*, —— F.2d ——, 91 LRRM 2595, 2599 (D.C. Cir. No. 73-1120, Mar. 4, 1976).

Thus, the permissible scope of a subcontractor's obligations under a "work preservation" agreement in any given instance must be recognized as limited by the scope of the construction agreement. To hold otherwise would result in the conclusion that the subcontractor has the power to negotiate away not only his own rights, but also the rights of third parties —i.e., the right of builders, architects and engineers to choose the material and products for their projects.[12]

Support for this position is provided by this Court's decision in *National Woodwork*. The Court therein recognized (386 U.S. at 642-643) that the employees' right to a lawful "work preservation" clause is a corollary to the employer's obligation under Section 8(a)(5) to bargain over the contracting out of bargaining unit work under the doctrine established in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964). If this is so, then the scope of the union's rights must be viewed as co-extensive with the scope of the employer's duty. And since, under *Fibreboard*, the employer cannot violate the Act by contracting out what he has never had, similarly under *National Woodwork*, the employees cannot negotiate to preserve work the employer has never

[12] Contrary to the view expressed by the D.C. Circuit in *Local 742, Carpenters (J. L. Simmons Co.)* v. *N.L.R.B.*, 444 F.2d 895, 899, 901 (1971), the subcontractor is not "contracting away" bargaining unit work by signing the construction contract. For rather than "signing a contract that would deprive [unit employees of] work" (44 F.2d at 899), the employer is signing a contract to *provide* them with as much work as is available on the project under the terms offered to him.

had. Thus, in the situation presented here, work preservation was simply not involved and there was no primary labor dispute.

The Fourth Circuit, in *Sachs* v. *Local 48, Plumbers Union*, 454 F.2d 879 (1972), made the very significant observation that the "mark of a labor dispute is the presence of economic adversaries." (454 F.2d at 883). The court pointed out that both the subcontractor and his employees may stand to gain by the exclusion of prefabricated products from the jobsite. For where work is done on the jobsite rather than in a factory, there normally is not only an increase in the available work for jobsite employees, but also a commensurate increase in the contract price paid to the construction subcontractor. See also, *George Koch Sons, Inc.* v. *N.L.R.B.*, *supra*, 490 F.2d at 328. Consequently, the subcontractor may in fact be more than an unwilling ally in the union's effort to cause the construction users to cease purchasing prefabricated products.

IV. This Court Should Approve the Interpretation of Section 8(b)(4)(B) Which Best Harmonizes That Section with the Policies of the Antitrust Laws

Recognition of the coinciding interests of construction subcontractors and building trades unions in preventing the use of prefabricated products suggests another pitfall inherent in permitting unions to reach, via overly-broad application of contracts with subcontractors, work controlled by others: i.e., the problem of conflict with the antitrust laws.[13] It is

[13] See Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 Harv. L. Rev. 904 (1976), where the author suggests that union pressures in right to control

one thing for a union and a contractor to agree that, when the contractor has a choice, he will direct that union members perform work on the jobsite rather than purchase a product which eliminates that work. This, we submit, is the narrow holding of *National Woodwork*.

A quite different issue is presented where, as here, a group of subcontractors and a union agree that the subcontractors will refuse to install a manufactured product, specified for a job or purchased by a user or another employer, thereby precluding users from purchasing the product, architects or engineers from specifying it, and manufacturers from selling it. We submit that this is precisely the type of union-employer combination found to violate the antitrust laws in *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797 (1945), and the reason that this Court, in *National Woodwork*, was careful to point out that it was expressing no view upon the antitrust limitations on work preservation or extension agreements. 386 U.S. 612, n.19.

It is abundantly clear, moreover, that Congress extended Section 8(b)(4) to apply to and preclude boycotts of the type involved in *Allen Bradley*. See, e.g., Legislative History of the Labor Management Relations Act, 1947, p. 428. *Cf. National Woodwork, supra*, 386 U.S. at 628-630. The court of appeals' decision in the present case ignores this intent by construing Rule IX of the Unions' standard agreement with Hudik and other New York area con-

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situations should be viewed as essentially "designed to police a cartel of subcontractors who have mutually agreed not to perform services that must be done on the jobsite unless they are given work which could be done elsewhere."

tractors as a valid obligation not to deal with persons who purchase or specify prefabricated goods. In other words, the court approves an interpretation of the contract that sets out an agreement among businessmen and with a union which clearly constitutes a prohibited restraint of trade.

If the court of appeals' interpretation of Section 8(b)(4)(B) is upheld, then, the effect will be to approve an interpretation of the NLRA which is plainly repugnant to the Sherman Act. And since a partial repeal of the Sherman Act is inferred if there is a "plain repugnancy between the antitrust and regulatory provisions . . .", *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682 (1975), quoting from *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1953), the court of appeals' interpretation, in a Sherman Act proceeding, would require an inference of partial repeal repeal of the Sherman Act to product boycotts. That is contrary to the result suggested by *Connell Construction Co.* v. *Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975), and *Allen Bradley*, and it is clearly out of keeping with the rule that implied repeals of the antitrust laws are highly disfavored. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, rehearing denied, 411 U.S. 910 (1973); *United States* v. *First City Nat'l Bank*, 386 U.S. 361 (1967); *California* v. *FPC*, 369 U.S. 482 (1962).

This, we submit, is another compelling reason for rejecting the court of appeals majority's interpretation of Section 8(b)(4)(B), and approving instead an interpretation which harmonizes the secondary boycott provisions of the Act with the antitrust laws. That result can be achieved in the present context

by holding, as did the Ninth Circuit in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, *supra*, 514 F.2d at 438, that "a union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign."

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed as prayed for in the petition of the National Labor Relations Board.

Respectfully submitted,

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April 30, 1976.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED STATES AND CANADA, AFL-CIO, *Respondent*.

MEMORANDUM OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MOTION FOR LEAVE TO SUBMIT MEMORANDUM AS AN *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Justices of the United States Supreme Court:

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves the Court to grant it leave to file the attached Memorandum which it herewith lodges with this Court. In support whereof, the Chamber states:

1. This case presents an issue of national importance in the administration of the National Labor Relations Act: the validity of the Board's "control" doctrine as applied to determine whether an employer subjected to alleged illegal secondary boycott pressures by a union, is a neutral, and therefore protected from such coercion by Section 8(b)(4)(B) of the Act, as amended, 29 U.S.C. 158(b)(4)(B).

2. The Chamber, as the nation's largest association of employers,* frequently participates as an *amicus curiae* in cases of national impact even when individual employers are also party to the lawsuit. See, *e.g.*, cases cited p. 2, *infra*. Here, however, the employer interests are not adequately represented. None of the party-employers have participated in the litigation before the Court of Appeals. Accordingly, the Chamber's participation will fill the void left by this absence.

3. The issues in this case are of major importance to the Chamber's members, many of whom are actively engaged in the construction industry or are users of services provided by construction concerns. These members are directly affected by the scope of permissible pressures labor organizations may direct against contractors at jobsites to enforce product boycotts under so-called "work preservation" agreements. The Chamber is thus vitally concerned that it have an op-

* The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals.

portunity to represent these affected interests before the Court. Otherwise the views of the employers affected by the Union's pressures in this case as well as the views of American industry will be unrepresented in this proceeding. And the broad membership interests represented by the Chamber places it in a position to bring considerations to the Court's attention which might not be advanced by the particular parties to this litigation.

4. The Chamber has participated in the instant case as an *amicus* in the Court of Appeals.

WHEREFORE, the Chamber prays the Court to grant it leave to file the following Memorandum as *amicus curiae* in the above captioned case.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1975

No.

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ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED STATES AND CANADA, AFL-CIO, *Respondent*.

MEMORANDUM OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT *

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associa-

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* This Memorandum is filed contingent upon the Court's granting the accompanying Motion for Leave to Submit, *infra*.

tions, a direct business membership in excess of fifty-two thousand (52,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to the Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relation matters before the Court. *E.g., Connell Constr. Co.* v. *Pumbers, Local 100,* 421 U.S. 616 (1975); *William E. Arnold Co.* v. *Carpenters,* 417 U.S. 12 (1974); *Super Tire Engin. Co.* v. *McCorkle,* 416 U.S. 115 (1974); *Boys Markets* v. *Retail Clerks,* 398 U.S. 235 (1970); *Porter Co.* v. *N.L.R.B.,* 397 U.S. 99 (1970).

There are issues in this case that are of major importance to the Chamber's members, many of whom are actively engaged in the construction industry or are users of services provided by construction concerns. The issues posed herein, which include the validity of the Labor Board's so-called "control test" as the decisive factor separating primary and secondary conduct under Section 8(b)(4)(B) of the National Labor Relations Act (29 USC § 158(b)(4)(B)), are of immediate concern to the Chamber's members. These members are directly affected by the scope of permissible pressures labor organizations may direct against contractors at jobsites to enforce product boycotts under so-called "work preservation" agreements. The Chamber is thus vitally concerned that it have an opportunity to represent these affected interests before the Court. Otherwise the views of the employers affected by the Union's pressures in this case as well as the views of American industry will be unrepresented in this proceeding. And the broad membership interests represented by the Chamber places it in a position to bring considerations to the Court's attention which might not be advanced by the particular parties to this litigation.

STATEMENT

I. The Board's Findings of Fact

The Austin Company, Inc., of Roselle, New Jersey ("Austin") was engaged as the general contractor for construction of the Norwegian Christian Home for the Aged in Brooklyn, New York. 204 NLRB at 760, 762.[1] Austin has no contract with Plumbers, Local 638 ("the Union") and does not employ plumbers or steamfitters. 204 NLRB at 762. Austin was also hired to engineer all job specifications for this construction project. 204 NLRB at 760, 762. These specifications included one requiring the installation of certain combination cooling and heating units to be manufactured by Slant/Fin Corporation of Greenvale, New York ("Slant/Fin").[2] The units, after purchase by Austin, carry a

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[1] The Decision and Order of the National Labor Relations Board is reported at 204 NLRB 760. The *en banc* decision of the Court of Appeals is reported at 521 F.2d 885. The petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1).

[2] This specification provided in relevant part:

> Furnish at the jobsote Slant/Fin Climate Command Air Conditioners. The unit shall be complete with cabinets, filters, cooling chasis, heating coil fans, main water flow and condensate assembly . . . .
>
> • • •
>
> The main flow and condensate assembly shall be factory installed as an integral part of the unit by the manufacturer . . . .

one-year guarantee if the internal piping in them is fabricated at the factory by Slant/Fin. 204 NLRB at 762. Slant/Fin has no contractual or other relationship with the Union, and it is uncontested that the Union has never sought a contract with Slant/Fin or attempted to organize Slant/Fin's employees. 204 NLRB at 763.

Following the submission of competitive bids, Austin, on January 14, 1972, awarded the heating, cooling and ventilation work on the Norwegian project to Hudik-Ross Co., Inc. ("Hudik"). 204 NLRB at 760, 762. This work included installation of 114 Slant/Fin heating-cooling units purchased by Austin, and the Board found that Hudik "was aware that the units it was to install contained internal piping that had already been cut and threaded." 204 NLRB at 760. Hudik is party to a collective bargaining agreement with the Union which includes "Rule IX." This provision provides in pertinent part (204 NLRB at 762):

> Radiator branches, converter branches and coil connections shall be cut and threaded by hand on the job . . .

Shortly after the Slant/Fin units were delivered to the jobsite on June 22, 1972, Union business agent William B. Daly informed Frank Hudik, President of Hudik, the units would not be installed because the piping inside the units was steamfitters work. Daly contended Rule IX required internal piping in the units to be cut and threaded on the job. 204 NLRB at 762. Frank Hudik told Daly these units were "part and

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* * *

Manufacturer shall furnish a written guarantee for a period of one year after completion of installation . . . .

parcel of the plans and specifications," that Hudik "had no choice in the matter," and that Hudik "did not buy this equipment." 204 NLRB at 762. Daly also told Austin's project superintendent, Plath, that Hudik's employees would not install the units. 204 NLRB at 760, 762 .The Union continued to refuse to permit Hudik's employees, who are members of the Union, to install the units, and at frequent intervals until at least September 1972, Union steward Zimmerman told Plath that Hudik's employees "were still under instructions from the Union not to install the Slant/Fin units." 204 NLRB at 763. As of the time of the unfair labor practice hearing on November 15, 1972, the Union still refused to install these units.

II. The Board's Decision and Order

The Board concluded that the object of the Union's work stoppage was either to force "a change in Austin's manner of doing business or [to force] Hudik to terminate its subcontract with Austin." 204 NLRB at 760. Since Hudik could not reassign the completed thread work to its employees and thus was powerless to meet or satisfy the Union's demands, the Board applied its so-called control doctrine to conclude that the Union's coercive pressure was not lawful primary activity. Rather, this conduct was undertaken for its effect on other neutral employers like Austin whose specification practices were inconsistent with the Union's interests.

The Board noted that the Union did not limit the focus of its conduct to the primary employer (Hudik). The Union directly and repeatedly informed Austin that "it would not let Hudik install [Slant/Fin] units involved." 204 NLRB at 760. Accordingly, the Board

held the Union's work stoppage was a secondary boycott which violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.[3]

The Board's order requires the Union to cease inducing or encouraging any individual employed by Hudik or any other person engaged in an industry affecting commerce to strike or refuse in the course of their employment to handle or work on factory piped heating and cooling units or related products when Hudik or such other person is required by contract to use such products, or to threaten to do so, where an object is to compel Hudik or such other person to cease using such products or to cease doing business with Austin or Slant/Fin. 204 NLRB at 766. Affirmatively, the Union is required to withdraw and rescind all directions or appeals to Hudik's employees to refuse to handle Slant/Fin units, and post the customary notices. 204 NLRB at 766.

III. The *En Banc* Decision of the Court of Appeals

Sitting *en banc* and with four circuit judges dissenting, the Court of Appeals remanded the case for further proceedings. The majority opinion disagreed with the Board's legal analysis and its factual finding. The majority considered the Board's control standard to be a *per se* test, incompatible as a matter of law with this Court's interpretation of Section 8(b)(4)(B) in *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U.S. 612 (1967). The majority stated (521 F.2d at 903): "We do not think that an employer who is struck by his own employees [to enforce a valid work preservation clause] can ever be considered a neutral bystander

[3] This statutory provision, along with Section 8(e) of the Act, is set forth in the Appendix attached to this Memorandum.

in a dispute not his own." With respect to the Board's factual findings, the majority concluded (521 F.2d at 903) the Union's work stoppage did not itself "[indicate] that the substance of the dispute was with a third party." The majority minimized the Union's contract with Austin's jobsite representative, labeling this "single occasion," as "no more than [what] Hudik should have done. . ." 521 F.2d at 900 n.36.[4]

The four dissenting circuit judges disputed both the majorities view of the scope of *National Woodwork* and the ruling that the Board had determined the legality of the Union's work stoppage solely by reference to Hudik's inability to reassign the disputed work to its employees. The dissenters emphasized (521 F.2d at 918) the Board's finding that "the Union had immediately and specifically informed Austin, the general contractor, who did not have a contract with or employ any member of the Union, that it would not permit Hudik to install the air-conditioning units." The dissenters considered this fact and other surrounding circumstances weighed by the Law Judge, such as the general-subcontractor relationship in the construction industry, and the unavailability of non-union labor in New York City, to provide an ample basis for the Board's unlawful secondary boycott finding. 521 F.2d at 937. This conclusion was well within and properly applied the Court's "surrounding circumstances" analysis formulated in *National Woodwork, supra,* 386 U.S. at 644 to the facts of this case. Since *National*

[4] Chief Judge Bazelon concurred in the majority opinion, noting he was unwilling to accept the Board's judgment that where the pressured employer can not accommodate the union's demands, the union is actually using a pressured employer in a dispute with another employer whose work assignment policies are inconsistent with the union's interest. 521 F.2d at 908.

Woodwork considered only a primary boycott, the dissenters further concluded that a secondary boycott undertaken to enforce a work preservation clause was not privileged by this decision. 521 F.2d at 939.

REASONS FOR GRANTING THE WRIT

1. This case presents an important and significant statutory interpretation question involving the secondary boycott provisions of the National Labor Relations Act (29 U.S.C. 158(b)(4)). That is when and under what circumstances an employer can be considered to be a "neutral" in a labor dispute and thereby protected from coercive union pressures by these statutory provisions. Section 8(b)(4)(B) bans the "secondary boycott" while concurrently permitting pressures against employers in primary labor disputes. "Thus there are two threads to § 8(b)(4)(B) that require disputed conduct to be classified as either 'primary' or 'secondary.' And the tapestry that has been woven in classifiying such conduct is among the labor law's most intricate." *NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297, 303 (1971). The statutory language itself suggests no criteria for distinguishing between legitimate primary and unlawful secondary conduct, but "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Local 761, Elec. Wkrs.* v. *NLRB,* 366 U.S. 667, 674 (1961).

To draw these difficult lines, the Board, in conformity with legislative history,[5] has gradually evolved the so-called control doctrine. Under this formula union pressures to secure compliance with a so-called work

[5] H.R. Rep. No. 245, 80th Cong. 1st Sess. 23 (1947). See also *Deanglo & Local Union 98,* 121 NLRB 676 (1958).

preservation clause are presumed primary and thus lawful, absent other evidence of unlawful object, if the pressured contractor has a collective bargaining agreement with the pressuring union or has the authority or "control" to assign the disputed work to conform to the union's demands. This presumption is based upon the settled legal principle that the pressuring union may be held accountable for the foreseeable consequences of its conduct,[6] and when its pressure is applied to an employer whose only realistic option is to cease doing business with another employer, it is reasonable to conclude that it is this unlawful consequence which the union intends. See, *e.g., Carpenters, Local 112 (Summit Valley Inds. Inc.),* 217 NLRB No. 129 (1975) (review petitions pending 9th Cir.) (Nos. 75-2064, 2166, 2770).

The Board's judgment that these factors may properly be given controlling weight under this statutory provision is an appropriate exercise of the Board's authority derived from Congress in Sections 1, 3(a), and 10 of the Act to apply and interpret the Act in a manner which strikes a proper balance between conflicting legitimate interests. Cf. *NLRB* v. *Weingarten, Inc.,* 420 U.S. 251, 266-7 (1975); *Linden Lumber* v. *NLRB,* 419 U.S. 301, 309-10 (1974); *NLRB* v. *Truck Drivers, Local 449,* 359 U.S. 87, 96-7 (1957). This is particularly true with respect to the arcane secondary boycott provisions of the Act which provide the Board little guidance to determine when union pressures ostensibly directed at a primary employer are actually intended to force neutral employers to change or abandon business methods which are incompatible with union interests. The Court has consistently approved the Board's judgments in this intricate

[6] *Radio Officers' Union* v. *NLRB,* 347 U.S. 17, 45 (1954).

and complex area. See *Carpenters, Local 1976* v. *NLRB*, 357 U.S. 93, 107 (1958); *Local 761, Elec. Wkrs.* v. *NLRB, supra*, 366 U.S. at 680; *NLRB* v. *Local 825, Operating Engineers, supra*, 400 U.S. at 304. Here, the Court of Appeals erred in substituting its judgment for that of the Board with respect to the appropriate standard for measuring the legality of union conduct within the scope of Section 8(b)(4)(B). Compare *Kennecott Copper Co.* v. *EPA*, 462 F.2d 846, 849 (D.C. Cir. 1972); *Braniff Airways, Inc.* v. *CAB*, 379 F.2d 453, 463 (D.C. Cir. 1967); *NLRB* v. *Directors Guild of America*, 494 F.2d 692 (9th Cir. 1974).

2. The Court of Appeals held that the Board's control doctrine was also inconsistent with the Court's interpretation of Section 8(b)(4)(B) set forth in *National Woodwork, supra*. 521 F.2d at 888-89. The Court of Appeals' reading of this decision conflicts with recent decisions of two other circuit courts. In *George Koch Sons, Inc.* v. *NLRB*, 490 F.2d 323 (1973), the Fourth Circuit upheld the Board's application of the control doctrine to preclude a union from striking an employer bound by the union's contract to enforce a valid work preservation clause. The court specifically rejected the same contentions with respect to *National Woodwork, supra*, which the Court of Appeals accepted in the instant case. The unanimous Fourth Circuit panel stated (490 F.2d at 327):

> *National Woodwork* did not scuttle the "right-to-control" test for, obviously, the point was not before the Court. 386 U.S. at 616-17, fn. 3, 87 S.Ct. 1250. Nor does the Board presently write in disregard of *National Woodwork*. Rather, it reads that decision for what it is, a delineation of that degree of proof which establishes a permissible primary boycott but falls short of evidencing the interdicted secondary boycott.

In *Associated General Contractors of Cal., Inc.* v. *NLRB*, 514 F2d 433 (1975), the Ninth Circuit affirmed its agreement with the Fourth Circuit that the "right-to-control" test is an important and appropriate factor to assess the union's object under the secondary boycott provisions of the Act, and that the control doctrine is well within this Court's reference to "all the surrounding circumstances" in *National Woodwork*. The Ninth Circuit also rejected the argument that *National Woodwork* authorizes all union conduct undertaken to enforce "work preservation" clauses. The court stated (514 F2d at 438):

> We believe *National Woodwork* must be limited by the right-to-control doctrine. A union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign. When it is applied to work beyond the employer's power to give, a work preservation clause necessarily embodies a prohibited secondary objective.[7]

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[7] This opinion reversed the Board's decision in the case and accepted the view of the Law Judge and dissenting Member Kennedy. See 207 NLRB 711 (1974). The Board has subsequently adopted the decision of the Ninth Circuit. *Southern California Pipe Trades, etc. (Assoc. Gen. Contractors of Cal. Inc.)*, 219 NLRB No. 53 (1975).

The court's decision is fully consistent with its earlier holding in *Western Monolithics Concrete Prods. Inc.* v. *NLRB*, 446 F.2d 522 (9th Cir. 1971). There, the court held only that the Board incorrectly applied the right of control test to permit a labor organization to pressure a general contractor who employed no members of the pressuring union and had no collective bargaining with the union in order to force the general to cease doing business with the subcontractor. That portion of the Board's decision which held, like the instant case and *Associated General Contractors, supra*, that the union unlawfully pressured the primary employer (the subcontractor) because the primary had no control over the type of fireplaces to be installed at the jobsite was "not on review and therefore remain[s] undisturbed." 446 F.2d at 527.

The Court of Appeals acknowledged these conflicting opinions and made no attempt to distinguish or reconcile them with its reaffirmation of its "previous holding that the [Board's] test impermissibly expands the congressionally intended scope of Section 8(b)(4)(B)." 521 F.2d at 889.[8] Since this decision squarely presents a conflict in the circuits with respect to an important question of statutory interpretation in an area vital to the ongoing administration of the Act,[9] review by his Court is appropriate.

3. The propriety of the Board's control doctrine has not previously been considered by the Court. In *National Woodwork supra*, the Court expressly held that this question was not then before it for review. 386 U.S. at 616-17 n.3. In other labor law cases the Court has granted petitions which, as here, present important and significant issues expressly left unresolved in earlier decisions. Compare *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 594-5 (1969) with *Linden Lumber* v. *NLRB*, 419 U.S. 301, 302 (1974); and *NLRB* v.

The Board has now held in agreement with *Western Monolithics, supra*, that a union may not coercively pressure an employer to enforce a work preservation clause if that employer does not employ members of the union and has no collective bargaining agreement with that union. *Local 112 Carpenters (Summit Valley Inds. Inc.), supra*. This holding parallels the reasoning in *Connell Constr. Co.* v. *Plumbers Local 100, supra*, where the Court limited construction union pressures to obtain lawful "hot cargo" clauses to employers party to a collective bargaining relationship. 421 U.S. at 633.

[8] The Court of Appeals referred to its earlier decisions in *Local 742, Carpenters* v. *NLRB*, 444 F2d 895, cert denied, 404 U.S. 986 (1971); and *Local 636, Plumbers* v. *NLRB*, 430 F2d 906 (1970).

[9] *E.g., Carpenters Local 112 (Summit Valley Inds. Inc.), supra; Elec. Wkrs., Local 501 (Assoc. General Contractors of Conn. Inc.)*, 216 NLRB No. 73 (1975); *Elec. Wkrs., Local 995 (Saia Elec. Inc.)*, 201 NLRB 259 (1973).

Allis-Chalmers Mfg. Co., 388 U.S. 175, 192-3, n.30 (1967) with *NLRB* v. *Boeing Co.*, 412 U.S. 67, 72-3 (1973). This petition presents another instance where additional guidance from the Court on a legal question left open in *National Woodwork* is now essential and timely.

4. The instant case also provides the Court with a timely opportunity to reconsider *National Woodwork* in light of subsequent events. Compare *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, 241 (1970); cf. *NLRB* v. *Weingarten, Inc., supra*, 420 U.S. at 266. Commentators have noted the adverse impact "work preservation" claims have upon the nation's housing market, and upon technological innovations in production methods. See generally Brinker and Taylor, "The Secondary Boycott Maze," 25 Lab. L.J. 418, 427 (1974); Petro, "Unions, Housing Costs, and the National Labor Policy," 32 Law & Contemp. Prob. 319, 322 *et seq.* (1968). Economists have also concluded that the work preservation concept is not based upon valid economic theory and does not actually have the effect of preserving jobs for union members.[10] These studies and conclusions by experts in non-legal disciplines were not before the *National Woodwork* Court. The knowledge now available, well advanced beyond

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[10] Myers and DePodwin, "The Economic Personality of the Construction Industry and the Need for Technological Change" (New York 1973); and Meyers and DePodwin, "A Theoretical Analysis of the Work Preservation Concept" (New York 1973).

The necessity for a coordinated interrelationship between national labor and economic policies has also been persuasively set forth in Wellington, *Labor and the Legal Process*, 298-333 (Yale 1968). Cf. *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942) (Labor Board must take account of other important congressional policies in administering labor policy).

that existent in 1967, may provide a basis for reconsideration of the conclusions reached in *National Woodwork*. Compare *Brown* v. *Bd. of Education*, 347 U.S. 483, 494, n.11 (1954). A more reasonable and preferable resolution of the conflicting interests accommodated by national labor policy may be obtained by substituting the orderly judicial process for redress of alleged violations of work preservation clauses for the adverse economic consequences now caused by job-site strikes and work stoppages. *E.g., Local 48, Sheet Metal Wkrs.* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: * * *
>
> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not

have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods or not to perform any services, at the establishment of the employer engaged in such distribution;

Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8 (b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.